No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, and ROBERT SIDEBOTHAM AND JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, and FRANK J. FONTES and DELGER TROWBRIDGE, His Attorneys,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-27-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles, California,

Counsel for Appellee.

In the United States District Court in and for the Southern Division of the Northern District of California

No. 32531

HELENE MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

PHIL C. KATZ, Administrator of the Estate of Robert Sidebotham, Deceased, et al.,

Defendants.

SECOND AMENDED COMPLAINT, QUIET TITLE ACCOUNTING AND INJUNCTION

Comes now, the plaintiff, and for cause of action alleges, as follows:

I.

That Robert Sidebotham died intestate on December 21, 1951. At said time he was in possession and control of certain property, description of which is set forth in Exhibit "A" attached hereto as *tho* more particularly set forth herein. That he was likewise in possession and control of additional property, nature and extent of which property is unknown to this plaintiff, and as soon as the same is ascertained, plaintiff will ask leave of Court to insert the same by way of amendment.

II.

That said property, upon decedent's death, passed from the control, possession and management of

decedent, to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit, W. L. Robison, the duly qualified and acting administrator of the Estate of Robert Sidebotham, deceased.

III.

That at the time of the death of said Robert Sidebotham, plaintiff and said decedent were tenants in common of said property and each of them was an owner of an undivided one-half of said property. That since the death of said Robert Sidebotham, plaintiff has continued to own an undivided one-half of said property, as her separate estate.

IV.

That said administrator has since December 21, 1951, repudiated said cotenancy, and refuses plaintiff both the right of possession and beneficial enjoyment of her share thereof as well as the right to an accounting as to the rents and profits appertaining thereto. That said repudiation is without right, and said defendant has no right, title, interest or estate in or to plaintiff's one-half of said cotenancy, either as administrator, or otherwise.

V.

That defendants Robert Sidebotham and James Sidebotham, are persons who claim said property herein referred to, to be and constitute the sole and separate estate of the decedent, and claim the same

as heirs at law of decedent, to the exclusion of plaintiff.

VI.

That Does I to V are ancillary administrators of the Estate of Robert Sidebotham, deceased, and are in the possession of property, all of which at the time of decedent's death, constituted property owned in common by plaintiff and decedent as hereinabove set forth. That the true names of said ancillary administrators will be inserted by amendment, when ascertained as well as a specification of property in their possession so held in cotenancy.

VII.

That defendants Richard Roe I to V and Jane Doe I to V, are corporation, copartnership, fiduciaries, banks, principals, and agents, of said decedent, whose true names are not at this time, known to plaintiff. That said defendants are in the possession of assets, contracts, accounts, beneficial interests, claims, demands, choses in action, including credits and equities, all of which at the time of decedent's death was owned in common by said decedent and plaintiff, and to which, to the extent of an undivided one-half thereof plaintiff has the right of immediate possession.

That by virtue of the fact that said defendants are in the possession and control of said property and assets, they are in a position to divert the same and to hide and conceal the same, to the irreparable damage and injury of plaintiff who has no

speedy or adequate remedy at law, to protect her rights.

That as soon as the true names and the identity of said defendants are ascertained, plaintiff will ask leave of Court to insert the same herein by amendment.

By Way of Further and Second Cause of Action Plaintiff Alleges as Follows:

I.

Refers to paragraphs I to VII, inclusive, of the first cause of action and repleads the same as though more particularly set forth herein.

II.

That plaintiff at all times herein mentioned has been the owner and entitled to the possession of an undivided 50% of the assets, property, both real and personal as well as the fruits and increase thereof which decedent possessed at the time of his demise.

Wherefore, Plaintiff Prays for Judgment as Follows:

That a writ of mandamus or mandatory injunction, or other proper order, issue, requiring defendants and each of them, their agents and representatives, to account for all monies, assets, and property in their possession, held for and to the account of the Estate of Robert Sidebotham, deceased, or his alleged heirs at law; and that they and each of them

be restrained from paying out further funds or delivering assets or other monies or properties, to third parties.

That defendants, and each of them be ordered to account for all monies, assets, and properties, in their possession, held for and to the account of the Estate of Robert Sidebotham, deceased, or his alleged heirs at law.

That the defendants, and each of them, be required to set forth the nature of their claims to said monies, assets, and property and all adverse claims of the defendant be determined by a decree of this Court, and that by said decree it be declared and adjusted that the defendants have no interest or estate whatsoever, and the assets accounted for to the extent of an undivided one-half thereof.

That it be decreed that plaintiff is the owner and entitled to the possession of an undivided half of the assets, monies and property, constituting the Estate of Robert Sidebotham, deceased.

For costs.

/s/ MANUEL RUIZ, JR.,
Attorney for Plaintiff.

EXHIBIT "A"

Contents of Safety Deposit Box at the American Trust Company in San Francisco containing the sum of	$64,770.00
Postal certificate account No. 9095	2,500.00
Redemption of twenty 50-cent U. S. War Savings Stamps	5.00
Mr. Kerner, payment acct. of stock sold prior to death	400.00
Bank of America (Day and Night)	1,867.00
Bank of America (7th and Olive)	1,120.79
Bank of America (Arguello and Geary)	2,524.75
Merrill, Lynch, Pierce, Fenner & Beane, balance of brokerage account	792.10
Pacific National Bank	525.79
U. S. Postal Savings	560.12
Anglo-California National Bank	993.24
Eureka Federal Savings and Loan Association	4,217.56
Personal property other than cash which consists of the following:	
White metal chain and white metal pendent, 5 white stones	300.00
1949 Lincoln Sedan, Engine No. 13 A7094	1,420.00
Shares of stock, 6 of El Vado Nevada Corporation, 2,000 of Inter-Provincial Oils, Ltd., 250 of Crescent Cities Properties Company, 250 of Crescent Properties Company	
One promissory note due to decedent at date of death from Harry L. Babb, 643 South Hill Street, Los Angeles	525.00

Real Estate in the City and County of San Francisco described: Beginning at a point on the N line of Geary Blvd., distant thereon 100 feet westerly from the westerly line of 14th Avenue; running thence westerly along the northerly line of Geary Blvd. 27 feet 6 inches; thence at a right angle northerly 100 feet; thence at a right angle easterly 27 feet 6 inches; and thence at a right angle southerly 100 feet to the point of the beginning. Being a portion of Block 1446, lot number 25, Improved..... 30,000.00

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

THIRD AMENDED COMPLAINT, QUIET TITLE ACCOUNTING AND INJUNCTION

Comes now the plaintiff, and prior to answer of the defendant, files her Third Amended Complaint, and for cause of action alleges as follows:

I.

She refers to paragraphs I to VII, inclusive, of her first cause of action, as contained in her second amended complaint to quiet title, accounting and

injunction, and repleads the same as though more particularly set forth herein, by reference.

II.

She refers to paragraphs I and II of her second cause of action, as contained in her second amended complaint to quiet title, accounting and injunction, and repleads the same as though more particularly set forth herein, by reference.

By Way of Further and Third Cause of Action, Plaintiff Alleges as Follows:

I.

That since the death of Robert Sidebotham, on December 21, 1951, she, as an aggrieved party, has discovered the following facts constituting fraud as against her, which fraud proximately occasioned her to suffer a grievous mistake, from which she desires relief.

II.

That she was married to decedent, Robert Sidebotham, on January 1, 1927. That she divorced Robert Sidebotham on November 14, 1946, in the State of Nevada by substituted service.

III.

That during the year 1938, and at a time that said Robert Sidebotham was sentenced to jail, for failure to report a real estate subdividing scheme to the State Real Estate Commission, he borrowed the sum of one hundred dollars ($100.00) from

plaintiff, and told her that as soon as he made some money he would pay her back. That thereafter, and until the middle of the year of 1940, he frequently saw plaintiff, and always informed her that he was broke, but would occasionally give her rent and food money. That said Robert Sidebotham never did inform plaintiff that he had made any money, never paid her back said sum of $100.00, and verily believed that he continued "broke."

IV.

That at the time of the death of said Robert Sidebotham, certain assets were found in his possession, under the following aliases, to wit: W. H. Towner, William Towner, George W. Thompson, George R. Stone, Russell Robert Smith, George William Smith, Russell R. Smith, R. R. Smith, W. H. Jackson, Edward W. Hutton, Edward Hutton, E. W. Hutton, George W. Fenton, George William Brown, George W. Anderson, Edward W. Sideboth, and several combinations of the name of Sidebotham.

That the property and assets so found in his possession under said names, is the same property which passed from the decedent's control, and management to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit: W. L. Robinson, the duly qualified and acting administrator of the Estate of Robert Sidebotha, deceased, and referred to in paragraph I of plaintiff's first cause of action. That the description

thereof is more particularly described in Exhibit "A" therein mentioned, and is pleaded herein and made a part hereof, as though set forth with particularity.

V.

That one of the reasons and purposes which said decedent had in so hiding his assets was to prevent plaintiff from sharing in acquests and gains during her marriage to him, and to cheat her of her interest therein, as his wife, and deprive her thereof. That the property hereinabove referred to constituted property acquired and accumulated by decedent Robert Sidebotham during the marriage of the parties as well as the fruits and increase thereof.

VI.

That after the year 1940 and during the year 1941 decedent refused to further cohabit with plaintiff, wrongfully and without cause, and thereafter remained away from her, and she did not know his whereabouts. That in the month of November, 1946, plaintiff procured a divorce from Robert Sidebotham in the State of Nevada on substituted service. When questioned by her attorney, whether there was any community property, she answered that she did not know. That said attorney, unbeknownst to plaintiff, nevertheless framed a formal pleading wherein it was stated that there was no community property. That plaintiff did not read the same but at the hearing of the action, wherein a divorce was granted to plaintiff, she did not tes-

tify concerning the existence or non-existence of property of the marriage.

VII.

That said Court did not dispose of the property rights of the parties, nor did it make an order concerning property, and there was no evidence submitted to the Court concerning the same, but the Court found nevertheless that the allegations of the complaint were true and sustained by the evidence. That the finding aforesaid was arbitrary and capricious, and the Court lacked the power and jurisdiction accordingly to make the same, since there was no evidence submitted on the subject whatsoever.

VIII.

That plaintiff seeks relief from her mistake and the estoppel which would otherwise apply, but for said mistake, in that an adjudication that there was no community property, under the facts hereinabove set forth, would result in great and irreparable damage and be contrary to all principles of justice. That the presumption of law to the effect that Robert Sidebotham admitted all of the facts which were pleaded in the Nevada Judgment, by reason of lack of personal service upon him, is a fiction which this Court of Equity ought weigh against the misconduct of said Robert Sidebotham in having actively concealed assets and property as hereinabove specified, which, under the law, plaintiff had an equal and vested interest with him. That plaintiff first discovered that she had signed the formal pleading

containing the sentence that there was no community property, referred to in paragraph VI hereinabove, after the institution of this case at bar, when her attorney, Manuel Ruiz, Jr., informed her of the same, on July 13th, 1953, said attorney having been on the same day so advised by the attorneys for the defendants.

Wherefore Plaintiff prays for judgment as follows:

That a writ of mandamus or mandatory injunction, or other proper order, issue, requiring defendants and each of them, their agents and representatives, to account for all monies, assets, and property in their possession, held for and to the account of the Estate of Robert Sidebotham, deceased, or his personal representative, or his alleged heirs at law; and that they and each of them be restrained from paying out further funds or delivering assets or other monies or properties, to third parties.

That defendants, and each of them be ordered to account for all monies, assets and properties in their possession held for and to the account of the Estate of Robert Sidebotham, deceased, his personal representative or heirs at law.

That the defendants, and each of them, be required to set forth the nature of their claims to said monies, assets, and property and all adverse claims of the defendant be determined by a decree of this Court, and that by said decree it be declared and

adjudicated that the defendants have no interest or estate whatsoever therein, and the assets accounted for to the extent of an undivided one-half thereof.

That the Court relieve plaintiff from any estoppel or mistake proximately resulting from the fraudulent conduct of concealment of said Robert Sidebotham concerning her property rights.

That it be decreed that plaintiff is the owner and entitled to the possession of an undivided half of the assets, monies and property, constituting the Estate of Robert Sidebotham, deceased.

For costs.

/s/ MANUEL RUIZ, JR.,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed August 6, 1953.

[Title of District Court and Cause.]

FIRST AMENDMENT TO THIRD AMENDED COMPLAINT

Comes Now the plaintiff, before answer filed, served and entered, and files her first amendment to her Third Amended Complaint, and alleges as follows:

I.

Refers to paragraph II of her Third Amended Complaint, and omits and strikes the same, and in stead and in place thereof alleges as follows:

II.

That she was married to the decedent, Robert Sidebotham, in the City of Tijuana, Lower California, Mexico, on May 30th, 1928. That she divorced Robert Sidebotham on November 14th, 1946, in the State of Nevada by substituted service.

/s/ MANUEL RUIZ, JR.,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 23, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT W. A. ROBISON, ADMINISTRATOR OF THE ESTATE OF ROBERT SIDEBOTHAM, DECEASED, TO THE THIRD AMENDED COMPLAINT AS AMENDED

Comes now the defendant, W. A. Robison, Administrator of the estate of Robert Sidebotham, deceased, and by way of answer to the third amended complaint as amended admits, denies and alleges as follows, to wit:

First Defense

The third amended complaint as amended fails to state a claim against this defendant on which relief can be granted.

Second Defense

I.

Said defendant is without knowledge or information sufficient to form a belief as to the truth of paragraph I of said third amended complaint as amended, except that he admits paragraphs I, II and V of the first cause of action as contained in plaintiff's second amended complaint; said defendant also admits that he and Phil C. Katz, as the prior administrator of said estate, have repudiated any cotenancy of the plaintiff in said property since about October 10, 1952, when they first heard of said claim of cotenancy of said plaintiff, and this defendant refuses the plaintiff any right of possession and beneficial or beneficial enjoyment of her share thereof, as well as any right to an accounting as to the rents and profits or profits appertaining thereto.

II.

Answering plaintiff's second cause of action (denominated II in said third amended complaint as amended), said defendant incorporates herein his answer to the first cause of action (denominated I in said third amended complaint as amended) herein by reference, and repleads the same as though set forth in full herein.

III.

Said plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, II, III and V of plaintiff's third cause of action set forth in

her third amended complaint as amended, except that he admits that plaintiff divorced Robert Sidebotham on November 14, 1946, in the State of Nevada by substituted service.

IV.

Plaintiff admits paragraph IV of the third cause of action of plaintiff's third amended complaint as amended except that he denies that certain assets were found in the possession of Robert Sidebotham at the time of his death under all of the aliases alleged in said paragraph, and in this behalf he alleges that most of his assets were in the name of Sidebotham with various combinations of his given names and initials.

V.

Said defendant is without knowledge or information sufficient to form a belief as to the truth of paragraph VI of the second cause of action except that he admits that during the year 1941 and thereafter said Robert Sidebotham remained away from plaintiff and that she did not know his whereabouts. He also admits that in the month of November, 1946, plaintiff procured a divorce from Robert Sidebotham in the State of Nevada on substituted service. Said defendant further admits that plaintiff's attorney in Nevada framed a formal pleading, to wit, a complaint for divorce, wherein it was stated that there was no community property.

VI.

Answering paragraph VII of said third amended complaint as amended, said defendant alleges that

he is without knowledge or information sufficient to form a belief as to the truth thereof but admits that the court in Nevada found that the allegations of the complaint were true and sustained by the evidence.

Third Defense

I.

That the three causes of action alleged in plaintiff's third amended complaint as amended are and each of them is barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure of the State of California.

II.

That the three causes of action contained in plaintiff's third amended complaint as amended are and each of them is barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure of the State of California.

III.

That the three causes of action contained in plaintiff's third amended complaint as amended are and each of them is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

IV.

That the three causes of action set forth in plaintiff's third amended complaint as amended are barred by plaintiff's laches, which has been and is prejudicial to said defendant by reason of:

(a) The death of Robert Sidebotham, deceased, and the inability to locate important witnesses and vital written evidence which has occurred by reason of the death of said Robert Sidebotham, deceased, which has irretrievably damaged the defense of this suit.

(b) The lapse of over eleven years since the separation of plaintiff from Robert Sidebotham, now deceased, and since he failed to give her any support, as the result of which delay many witnesses important to the defense have disappeared and much written evidence vital to the defense has been irretrievably lost.

Fourth Defense

That on the 14th day of November, 1946, at Carson City, Nevada, in an action then pending in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, between Madeline Sidebotham, plaintiff, who is also the plaintiff herein, and Robert Russell Sidebotham, defendant, in which the plaintiff sued said defendant for a divorce, said court obtained judisdiction over defendant by service of summons by publication and mailing in the manner provided by the statutes of the State of Nevada; that plaintiff put in issue the question of whether there was any community property of the parties, she expressly alleging that there was no community property of the parties, and the court made an express finding that all of the allegations in the complaint were true; that by rea-

son thereof the very question sought to be litigated in this court has already been litigated by a court having jurisdiction of the subject matter and the defendant husband, and said question cannot now be litigated again.

Fifth Defense

Plaintiff is estopped to claim any portion of the estate of Robert Sidebotham, deceased, as community property, because on September 11, 1946, she caused a written complaint for divorce to be filed in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, against Robert Russell Sidebotham (now deceased, whose estate is now being sued by plaintiff herein), in which she alleged under oath that there was then no community property belonging to the parties to said suit. Plaintiff caused this complaint to be served on the defendant in a manner provided by the laws of the State of Nevada, and this defendant is informed and believes and therefore alleges that said Robert Russell Sidebotham relied on said allegation as to there not being any community property, and because of said reliance on said sworn statement of plaintiff failed and neglected to make any defense to said action and allowed plaintiff to obtain judgment in said action by default, although said defendant therein, as this defendant is informed and believes and therefore alleges, had ample grounds for successfully contesting and defeating plaintiff's said action. By reason of said facts plaintiff is estopped by her said conduct from

now contradicting her sworn statement that there was no community property of the parties when she divorced said Robert Russell Sidebotham as herein alleged.

Wherefore, said defendant prays that he may be dismissed hence with his costs of suit, and for such other and further relief as may be proper in the premises.

Dated: March 17, 1955.

/s/ DELGER TROWBRIDGE,

/s/ FRANK J. FONTES,

Attorneys for Defendant W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

ANSWER TO THIRD AMENDED COMPLAINT AS AMENDED BY FIRST AMENDMENT THERETO

Come Now the defendants, Robert Sidebotham and James Sidebotham, and answering the third amended complaint as amended by the first amendment thereto, said defendants jointly and severally deny and allege the following:

I.

Answering the allegations contained in paragraphs I to VII of the first cause of action contained in the second amended complaint incorporated by reference in said third amended complaint, said defendants admit that Robert Sidebotham died intestate on December 21, 1951, and that these answering defendants claim the property referred to to be and constitute the sole and separate estate of said decedent and claim the same as heirs at law of said decedent to the exclusion of plaintiff.

Said defendants have no information or belief sufficient to enable them to answer the remaining allegations so incorporated by reference and on said ground deny generally and specifically, each and every, all and singular, the allegations in said paragraphs I to VII of said first cause of action in the second amended complaint incorporated by reference in said third amended complaint not heretofore expressly admitted.

II.

Answering the allegations contained in paragraphs I and II of the second cause of action contained in said second amended complaint and incorporated by reference in said third amended complaint, said defendants hereby refer to paragraph I hereinbefore appearing and incorporate the allegations and denials therein contained by reference at this point, as if the same were fully recopied and set forth at length.

Said defendants further deny generally and specifically, each and every, all and singular, the allegations contained in paragraph II of said second cause of action contained in said second amended complaint incorporated by reference in said third amended complaint.

III.

Answering the allegations contained in the third cause of action contained in said third amended complaint as amended by the first amendment to the third amended complaint, said defendants have no information or belief sufficient to enable them to answer any of the allegations contained and referred to in said pleadings and on said ground deny, generally and specifically, each and every, all and singular, the allegations in said third cause of action in said third amended complaint and said first amendment to third amended complaint contained.

As and for a Second, Separate and Distinct Defense to each and every of the causes of action set forth and referred to in said third amended complaint as amended, said defendants, and each of them, jointly and severally allege that said third amended complaint as amended fails to state facts sufficient to constitute a cause of action against said defendants, or either of them.

As and for a Third, Separate and Distinct Defense to each of the causes of action attempted to be set forth by plaintiff herein, said defendants, and each of them, allege that each of said causes of action is barred by the provisions of subdivision 1 of

Section 337 of the Code of Civil Procedure of the State of California.

As and for a Fourth, Separate and distinct Defense to each of the causes of action attempted to be set forth by plaintiff herein, said defendants, and each of them, allege that each of said causes of action is barred by the provisions of subdivisions 3 and 4 of Section 338 of the Code of Civil Procedure of the State of California.

As and for a Fifth, Separate and Distinct Defense to each of the causes of action attempted to be set forth by plaintiff herein, said defendants, and each of them, allege that each of said causes of action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

As and for a Sixth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that each of the causes of action attempted to be set forth by plaintiff herein is barred by plaintiff's laches.

As and for a Seventh, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that each of the causes of action attempted to be set forth by plaintiff herein is barred by the laches of plaintiff for the following reasons:

(a) The death of said decedent and the inability to locate important witnesses and written evidence

which has occurred by reason of said death prevents said defendants from securing evidence which would enable them to present a defense otherwise available.

(b) That plaintiff has delayed over eleven years since her separation from said decedent in asserting her claims which she is herein attempting to allege and by reason of the delay of plaintiff, evidence otherwise available has become lost or destroyed.

(c) That it appears from the allegations of plaintiff's complaint that no investigation was made by her until after the death of Robert Sidebotham to ascertain whether he had any assets or even to assert any claim against him during his lifetime and by reason of such action of said plaintiff, the rights of said defendants have become prejudiced and destroyed.

As and for an Eighth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that plaintiff herein commenced an action in the First Judicial District Court of the State of Nevada in and for the County of Ormsby, against decedent herein for a divorce, under which action said court obtained jurisdiction over defendant by constructive service, as provided by law and that in the complaint in said action, plaintiff herein as plaintiff in said action alleged under oath that there was no community property of the parties and the court in said action made an express finding that

all of the allegations in the complaint were true. That said decision has become final and no appeal was taken therefrom and it is now res judicata and finally determines that plaintiff herein had and has no rights to any of the property of said Robert Sidebotham.

As and for a Ninth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that plaintiff is estopped from claiming any portion of the estate of Robert Sidebotham, deceased, for the reason that she caused a written complaint for divorce to be filed in the First Judicial District Court of the State of Nevada in and for the County of Ormsby against said Robert Russell Sidebotham, the decedent whose estate is now being sued herein, in which complaint plaintiff herein alleged as plaintiff therein, under oath, that there was then no community property belonging to the parties to said suit. That plaintiff caused a copy of said complaint to be served on defendant said decedent in the manner provided by the laws of the State of Nevada and said defendants are informed and believe and therefore allege that said defendant in said action relied upon the allegation of plaintiff herein in said complaint that there was no community property of himself and said plaintiff herein and because of said reliance on said sworn statement he failed and neglected to make or interpose any defense to said action, although said defendant had ample grounds for successfully con-

testing and defeating plaintiff's said action. That by reason of said facts, plaintiff is estopped by her conduct from contradicting her verified statement that there was no community property of the parties when she divorced said Robert Russell Sidebotham as herein alleged.

As and for a Tenth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that plaintiff is estopped from claiming any portion of the estate of Robert Sidebotham, deceased, for the reason that she caused a written complaint for divorce to be filed in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby against said Robert Russell Sidebotham, the decedent, whose estate is now being sued herein, in which complaint plaintiff herein alleged as plaintiff therein, under oath, that there was then no community property belonging to the parties to said suit. That plaintiff caused a copy of said complaint to be served on defendant, said decedent, in the manner provided by the laws of the State of Nevada and said defendants are informed and believe and therefore allege that said defendant in said action relied upon the allegation of plaintiff herein in said complaint that there was no community property of himself and plaintiff herein and because of said reliance on said sworn statement he failed and neglected to make or interpose any defense to said action, although said defendant had ample grounds for successfully con-

testing and defeating plaintiff's said action. That plaintiff herein, as plaintiff in said action in said Nevada court, obtained a judgment of said court which at said time had jurisdiction of the parties before it, to wit, said plaintiff herein and said Robert Russell Sidebotham, and in the findings in said matter said court found that all of the allegations in said complaint were true and a judgment was entered by said court in said matter in favor of the plaintiff and against said Robert Russell Sidebotham. That no appeal was taken from said judgment and the same has become final. That by reason of the foregoing plaintiff is now estopped by the judgment of said Nevada court from contending that there is any community property of said plaintiff and said defendant in said action or that plaintiff herein has any claim whatsoever against any of the assets or property of said Robert Sidebotham, deceased.

Wherefore, having fully answered said complaint, said defendants pray that plaintiff take nothing by her action herein and that they be henceforth dismissed, together with their costs of suit.

/s/ THEODORE M. MONELL,
Attorney for Defendants Robert Sidebotham and James Sidebotham.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Leave of Court being first had and obtained, the defendants in the above-entitled matter filed this, their amendment to the answers heretofore filed by them herein, and allege the following:

As and for a Further, Separate and Distinct Defense, said defendants, and each of them, allege that on or about August 6, 1940, said decedent, Robert R. Sidebotham, commenced an action against plaintiff herein in the District Court of the Second Judicial District, County of Albany, in the State of Wyoming, for divorce on the ground of the wilful desertion by plaintiff herein (being the defendant in said action) of the said decedent, Robert R. Sidebotham. That thereafter in said action and after jurisdiction was lawfully obtained therein, said District Court of the Second Judicial District, County of Albany, State of Wyoming, rendered its decree on November 2, 1940, granting to said Robert R. Sidebotham a decree of absolute divorce from the defendant in said action, being the plaintiff herein, and dissolving and holding for naught the marriage contract theretofore entered into between said decedent and plaintiff herein. That no appeal was taken from said judgment and said judgment is final and valid and still in full force and effect.

That there was no community or other property of said decedent and plaintiff herein accumulated

or acquired after entry of said decree of divorce hereinbefore mentioned. That at the time of obtaining said divorce there was no community property existing in which plaintiff herein had any interest.

Wherefore, having fully answered said defendants pray that plaintiff take nothing by her action herein and that said defendants be hence dismissed, together with their costs of suit herein incurred.

/s/ FRANK J. FONTES,
/s/ DELGER TROWBRIDGE,
/s/ THEODORE M. MONELL,
Attorneys for Defendants.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1955.

[Title of District Court and Cause.]

AMENDMENT TO ANSWERS OF DEFENDANT W. A. ROBISON, ADMINISTRATOR OF THE ESTATE OF ROBERT SIDEBOTHAM, DECEASED, AND OF DEFENDANTS ROBERT SIDEBOTHAM AND JAMES SIDEBOTHAM

Come now the defendants, W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased; Robert Sidebotham and James Sidebotham, and each of them hereby amends his answer to the third amended complaint as follows:

For a Further Separate and Sixth Defense, said defendants, and each of them, allege that on the 10th day of December, 1953, in a proceeding then pending in the Superior Court of the State of California in and for the City and County of San Francisco, entitled "In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased," and numbered 123669 therein, and for the same cause of action as that set forth in the third amended complaint herein, a decree was duly given and made establishing that Helen Marceau Sidebotham, the plaintiff herein, had no right, title or interest of any kind whatsoever in the cause of action described in said proceeding, which is the same cause of action described in the above-entitled action, and that Robert Sidebotham and James Sidebotham, two of the defendants in this action, were the sole heirs at law of Robert Russell Sidebotham, alias, deceased, who died intestate, and the only persons entitled to distribution of the estate of said Robert Russell Sidebotham, alias, deceased.

Wherefore, said defendants pray that plaintiff take nothing by this action, and that they be hence dismissed with their costs.

Dated: October 22, 1955.

/s/ DELGER TROWBRIDGE,

/s/ FRANK FONTES,

Attorneys for Defendant W. A. Robison, as Said Administrator;

/s/ THEODORE M. MONELL,
Attorney for Defendants Robert Sidebotham and James Sidebotham.

Duly verified.

[Endorsed]: Filed October 27, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

This case was removed to the federal court because of diversity of citizenship (28 U.S.C., Sec. 1441).

The background of this case in its pleading stage, and the major allegations of plaintiff's complaint are to be found in the opinion of the Court of Appeals reported in 216 F. 2d 816. The lower court granted motions to dismiss the complaint on file herein on November 5, 1953, without leave to amend. This order was appealed, and the Court of Appeals ruled that "'the appellant, in her third amended complaint, has pleaded facts showing a violation of her rights to property claimed and held by appellees."

On the trial of this case the plaintiff proved by credible evidence that she was the victim of a fraud on the part of her husband, Robert Sidebotham, in that he kept her in ignorance of the true extent of

their community property. Further, that she did not until after the death of Robert Sidebotham on December 21, 1951, discover facts constituting fraud against her, from which she here seeks relief. In other words, plaintiff sustained the burden of proving the allegations of her complaint, i.e., fraud; her reliance on the fraudulent representations of decedent; and her lack of knowledge of the true extent of the community property of the marriage up until the latter part of 1951.

The defendants raised several defenses to plaintiff's claim:

(1) That the parties were validly divorced in the year 1940 by virtue of a Wyoming decree secured by decedent;

(2) That the statement, "there is no community property," in the plaintiff's Reno divorce complaint should preclude her recovery herein;

(3) That plaintiff did not sustain her burden of proving that the property on hand at the time of death was community property rather than decedent's separate property;

(4) That the decree in the proceeding commenced by plaintiff under Section 1080 of the Probate Code is res judicata in this case; and

(5) That plaintiff has allowed the statute of limitations to run against her, has been guilty of laches or by her conduct has estopped herself from relying on the Nevada divorce decree.

(1) Validity of Wyoming Divorce

The defendants contend that the Wyoming divorce decree secured by the decedent in 1940 was valid. The plaintiff contends that said decree was void because of false statements in the affidavit made by decedent to obtain the order of publication of summons. Said Wyoming decree, which, in any event, did not purport to dispose of any property rights between the spouses is subject to collateral attack. The plaintiff herein, a California resident, did not participate in the Wyoming proceedings nor did she make a personal appearance therein.

The parties after their marriage in 1928 lived in the State of California, and lived in other states, as husband and wife. The facts showed that the decedent was living separate and apart from his wife, without her fault, at the time he secured the Wyoming decree by means of substituted service. There was no evidence whatsoever, other than the recital in the Wyoming decree, that the decedent ever resided there, nor did that fact change the matrimonial domicile of the parties from California.

The evidence is uncontradicted that in 1940, when the decedent procured his divorce in Wyoming, he stated upon his oath, that the residence of the plaintiff was "unknown and cannot, with reasonable diligence be ascertained." He thereby committed a fraud upon the Wyoming Court, and upon the plaintiff, his wife. Plaintiff testified that decedent visited her, cohabitated with her, and paid

her rent in the year 1940. This testimony was corroborated by Mr. Scardino, whose parents owned the hotel where plaintiff resided at that time. This evidence establishes the fact that decedent did know where his wife was residing at the time he swore he did not. The divorce decree rendered by the Wyoming Court is not entitled to full faith and credit, Delanoy vs. Delanoy, 216 Cal. 27, and the fraud committed by decedent renders the decree invalid.

(2) The Reno Divorce Decree

Defendants contend that plaintiff is in error in maintaining that the Nevada divorce decree secured by her in 1946 is helpful to her case. Defendant states that there is nothing in the opinion of the Court of Appeals to overthrow the usual rule concerning admissions against interest, and that the statement "there is no community property," appearing in plaintiff's divorce complaint was an admission against interest by plaintiff. In view of all of the evidence it cannot be said that this statement contained in plaintiff's divorce complaint should preclude recovery in this case. Plaintiff's position, which is the basis of her suit, is that for all the years that she was married to decedent, and up until 1951, she was completely uninformed as to any community property which may have been in existence. Her allegation in her divorce complaint was based on this limited knowledge, and her reliance on decedent's statements that he did not have any prop-

erty. Plaintiff's statement made as it was in reliance on decedent's fraudulent representations, should not bar her recovery.

(3) Tracing of Assets

Defendants contend, that plaintiff has no case unless she can prove by the preponderance of the evidence that the property on hand in 1951 was on hand when the Wyoming decree was obtained in 1940, or its changes are definitely identified. In view of the invalidity of the Wyoming decree, the date of the Reno decree in 1946 is the date from which the accounting should be made.

The evidence reveals that the decedent opened his safety deposit box in San Francisco, January 9, 1943, which was almost four years prior to the divorce procured by plaintiff. He kept in this safety deposit box, or succeeding numbers of the same, at the time of his death, $64,770.00 in cash, $2,500.00 Postal Savings Certificates, 20 25-cent War Savings Stamps, and various other documents, right next to the money and currency, which bore dates commencing April 23, 1928; July 21, 1931; July 5, 1935, as well as other dates, prior to the year 1946.

The attorney for defendants read into evidence the actual and specific denominations of cash bills of currency found in the safety deposit box, but did not read a single serial number which would indicate the year and vintage of the bills.

The evidence shows that decedent opened his Pacific National Bank account in San Francisco on

November 21, 1946; the Anglo California National bank account on December 4, 1941, and another one at the same bank on August 31, 1946. The decedent opened his Bank of America account on June 5, 1943, and his account with Merrill, Lynch, Pierce, Fenner and Beane on February 8, 1946.

Counsel for the parties herein stipulated, in substance, to the following:

"That between the years 1935 and 1946, Mr. Sidebotham, the decedent, was busy in negotiating deals pertaining to real estate transactions and oil royalties, in which he had an interest, and which numbered approximately seventy in number."

The evidence also shows that the administrator of decedent's estate filed a letter mailed by the U. S. Treasury Department, which determined the decedent's tax liability, insofar as the records of that office were concerned. Said Treasury letter indicated that decedent did not file a tax return for the years 1946 through 1950 but that he did file a return for 1951, in the sum of $10,015.06. The administrator corroborated the facts stated in said letter. There is a presumption, of course, that decedent complied with the law, i.e., he did not commit a crime or fraud in failing to file returns in the years 1946 through 1950. Then the conclusion must follow that decedent was living from capital acquired prior to his divorce in 1946, during those years when he did not file such returns. Therefore, all but $10,015.06 of his estate must have been accumulated prior to the year 1946.

With this evidence in the record the court concludes that all of decedent's property, other than $10,015.06 was community property, to which plaintiff has a legal right if she prevails herein.

(4) The Effect of the Decree Under Section 1080 of the Probate Code

The defendants contend, in effect, that plaintiff's claim has already been adjudicated because she filed a petition for determination of heirship in the Probate Court, and allowed a default to be taken against her.

The record indicates that plaintiff was not sure of the state court's jurisdiction, and that she filed two matters at about the same time. One of the matters was in the Probate Court, and the other was the action now before this court.

The plaintiff contends that after she filed in the Probate Court, she withdrew because of the fact that she was not in privity with the estate, and accordingly said court was without jurisdiction of the subject matter of her claim. In the instant case the plaintiff was not decedent's widow, and at the time of his death was a stranger to the estate. The law of California states that the Probate Court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate. Estate of King (1926), 199 Cal. 113. The court's holding in the case of Schylen vs. Schylen, 43 Cal 2d 361, has not changed this general rule. That

case decided that matters which the State Superior Court acting in the exercise of its probate jurisdiction may try, can nevertheless be tried in the Superior Court by virtue of its general jurisdiction, by waiver of the parties, but that matters which must be tried in the Superior Court in its general jurisdiction, such as claims of title between the estate and strangers cannot be tried in the Probate Court since the Probate Court is without jurisdiction.

Quoting from page 373 of said opinion:

"It is certainly true that the court in a probate proceeding is concerned with the settlement of the estate and not with controversies between the estate and strangers, the adjudication of which is the function of the court in the exercise of its general jurisdiction."

The Probate Court did not have jurisdiction to hear plaintiff's claim and therefore she is not precluded from proceeding herein.

(5) Statute of Limitations: Laches, Estoppel

Defendants cite the case of Champion vs. Wood, 79 Cal. 17, which case precluded the wife's recovery because of laches, as similar to the facts of the instant case, and therefore determinative against plaintiff. The question before the appeals court in Champion vs. Wood, supra, was whether the complaint stated facts sufficient to constitute a cause of action. The court stated:

"It is not claimed in the complaint that any misrepresentations were made as to the amount of property which had been acquired during the marriage. They were misrepresentations as to the rights of the parties with respect to the property misrepresentations of law."

This quotation clearly distinguishes the Champion case, as plaintiff in the instant case was wholly unaware that property was being accumulated during the marriage, and decedent had property secreted under many aliases. None of this property was ever brought to the attention of the wife until after the death of decedent.

All of the arguments submitted by counsel for the defendants as to plaintiff's failure to investigate decedent's financial position, when placed in proper perspective, actually constitute arguments in favor of plaintiff. This is so because they forcefully underline the fact of plaintiff's reliance on decedent's misrepresentations.

The plaintiff was not put on inquiry by anything she knew of deceased's wealth, since the evidence revealed there were no indications that he had any, so successful had his concealment been. The husband's deception, which continued up to the time of his death, was concealment of the plaintiff's right of action, against which the Courts of California grant relief, dating from discovery even in cases not involving fiduciary relations. The evidence when considered in its entirety does not show the elements or the presence of estoppel or laches,

and does not support the defense of statute of limitations.

In accord with the foregoing, it is Ordered that the defendants account for all monies, assets, and properties, held for and to the account of the Estate of Robert Sidebotham, deceased;

That the sum of $10,015.06 be subtracted from the sum total of said assets, monies and properties; and

It Is Decreed that plaintiff is the owner and entitled to the possession of an undivided one-half of the balance of said assets, monies and properties, constituting the Estate of Robert Sidebotham, deceased. The plaintiff shall prepare findings of fact and conclusions of law in accordance with the rule, and the respective parties shall pay their own costs.

Date: Jan. 24, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed January 24, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having been heard by the Court without a jury and evidence, both oral and documentary having been presented and the

matter duly submitted, the Court now makes the following findings:

Findings of Fact

1. That Robert Sidebotham died intestate on December 21, 1951. At the time of his death he was in possession and control of the property specified in Inventory and Appraisal filed in probate proceedings, case No. 123669, California Superior Court, City and County of San Francisco, in re: Estate of Robert Sidebotham, deceased, inclusive of the following, to wit: Contents of Safety Deposit Box, at the American Trust Company, in San Francisco, containing the sum of $64,770.00; postal certificate No. 9095, $2,500.00; twenty 25-cent War Savings Stamps, $5.00; stock sold prior to death, $400.00; Bank of America (Day & Night), $1,867.00; Bank of America (6th and Olive), $1,120.79; Bank of America (Arguello and Geary), $2,524.75; Merrill, Lynch, Pierce, Fenner & Beane, brokerage account, $792.10; Pacific National Bank, $525.79; U. S. Postal Savings, $560.12; Anglo-California National Bank, $433.24; Eureka Federal Savings and Loan Association, $4,217.56; 1949 Lincoln Sedan, Engine No. 13 A7094, $1,420.00; Real Estate in the City and County of San Francisco, described: Beginning at a point on the N. line of Geary Blvd., distant thereon 100 feet westerly from the westerly line of 14th Avenue; running thence westerly along the northerly line of Geary Blvd. 27 feet, 6 inches, thence at a right angle easterly 27 feet, 6 inches;

and thence at a right angle southerly 100 feet to the point of the beginning, being a portion of block 1446, lot number 25, improved, $30,000.00; six shares of the capital stock of El Vado Corporation, Nevada corporation, Certificate No. 19, dated July 5, 1935. Two Thousand shares of the capital stock of Inter-Provincial Oils, Ltd., Dominion of Canada, Certificate No. 5766, dated July 21, 1931. Five Hundred shares of the capital stock of Crescent City Properties Company, Nevada corporation, Certificate No. 14, dated April 23, 1928, 250 shares, and Number 15, dated April 23, 1928, 250 shares. That said property was held, kept and controlled by him, under various and sundry names and aliases.

2. That said property, upon the death of Robert Sidebotham, passed from the control, possession and management of said decedent, to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit: W. L. Robison, the duly qualified and acting administrator of the Estate of Robert Sidebotham, Deceased, being one of the defendants in the action.

3. That the plaintiff, Helen Marceau Sidebotham, and said decedent, Robert Sidebotham, were married in the City of Tijuana, Lower California, Mexico, on May 30, 1928, and remained husband and wife until she divorced Robert Sidebotham on November 14, 1946, in the State of Nevada, by substituted service. That although said judgment of divorce found the allegations of the complaint to be true, one of which allegations was

that there was no community property, plaintiff was not aware that the same was in her complaint, she was not questioned at the trial about any community property, and the decree made no adjudication of property rights. That the plaintiff first discovered that her complaint in the Nevada action made reference to the fact that there was no community property on or about July 13, 1953. That the property involved in the case at bar was located outside of the State of Nevada, and the jurisdiction of that State Court.

4. That the decedent at all times concealed from the plaintiff the fact that he had accumulated property during the marriage, which belonged to the community. She was at all times ignorant concerning the extent thereof, nor was she put on inquiry concerning any circumstances known to her, nor did she until after the death of Robert Sidebotham, on December 12, 1951, dicover facts constituting the existence of said property and of the said fraud against her.

5. That said property, excepting the sum of $10,015.06, was acquired prior to November 14, 1946, by the decedent, and all of his estate was acquired or accumulated during the marriage relationship of the parties, inclusive of the period of time between the years 1935 and 1946, during which time the decedent was busy in negotiating deals pertaining to real estate transactions and oil royalties, in which he had an interest, and which numbered approximately seventy in number. That on November 14,

1946, by virtue of the divorce between the parties, plaintiff and said decedent became, and ever since have been, tenants in common of said property, save and except said sum of $10,105.06 thereof.

6. That the decedent procured a judgment of divorce against plaintiff in the State of Wyoming on October 2, 1940. That said judgment was upon substituted service. That when the decedent procured said divorce in Wyoming, he stated upon his oath, that the residence of the plaintiff was "unknown and cannot, with reasonable diligence be ascertained." That said decedent did in fact know where the plaintiff resided, prior thereto in the year 1940, in the City of San Francisco, where he visited her, cohabited with her, and paid her rent in said year 1940. That said judgment did not purport to dispose of any property rights. That it is subject to collateral attack, in that it was obtained by false statements in the affidavit made by decedent to obtain the order of publication of summons. That said decree was void. That in 1940 the matrimonial domicile of the parties was the State of California. That plaintiff was a resident of California, did not participate in the Wyoming proceedings, nor did she make a personal appearance therein.

7. That at the time of decedent's death, the plaintiff was not decedent's widow, but she was a stranger to the estate. That she filed a claim to the property rights asserted herein under Section 1880 of the Probate Code of the State of California in

the Estate Probate proceedings in the Superior Court of the State of California, in San Francisco, but did not pursue the claim further and allowed a default to be taken against her. She did so because of the fact that she was not in privity with the estate, and on the basis that the said probate court had no jurisdiction of the subject matter of her claim. It is found that the probate court aforesaid had no jurisdiction.

8. The defendants, Robert Sidebotham and James Sidebotham, are sons of decedent, by a prior marriage, and are entitled to take as heirs at law, and as their rights may be determined under the laws of succession of the State of California, as to the property left by decedent, not otherwise disposed of in favor of the plaintiff by this judgment.

Conclusions of Law

1. That all of the monies, assets, and properties possessed and controlled by the decedent at the time of his death on December 21, 1951, and held for and on account of the Estate of Robert Sidebotham, deceased, excepting the sum of $10,015.06 thereof, were acquired and accumulated by said decedent, prior to November 14, 1946.

2. That plaintiff has at all times since November 14, 1946, been the owner and entitled to the possession of an undivided one-half thereof as tenant in common.

3. Defendants are ordered to account to the plaintiff for all such monies, assets and properties

held for and to the account of the Estate of Robert Sidebotham, Deceased.

Let Judgment Be Entered Accordingly in Favor of the Plaintiff and Against Defendants, and Each of Them; Each of the Parties to Bear His or Its Own Costs Incurred Herein.

Dated: January 27th, 1956.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Affidavit of Service by Ma... attached.

Lodged January 30, 1956.

[Endorsed]: Filed February 27, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 32531

HELEN MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, et al.,

Defendants.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury, and the Court having

heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff have and recover judgment against the defendants, W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased; and James Sidebotham and Robert Sidebotham.

The defendant, W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased; and James Sidebotham and Robert Sidebotham, are hereby ordered to account to plaintiff Helen Marceau Sidebotham, for all monies, assets, and properties, which have been held for and to the account of the Estate of Robert Sidebotham, deceased.

It is further ordered that defendant W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased, pay out of the funds of said estate, in due course of administration, to plaintiff Helen Marceau Sidebotham, an undivided one-half of all the monies, assets, and properties, possessed and controlled by the decedent, at the time of his death on December 21, 1951, after first deducting therefrom, the sum of Ten Thousand Fifteen Dollars and Six ($10,015.06) Cents.

Each of the parties shall bear his or its own costs.

Dated January 27, 1956.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Lodged January 30, 1956.

[Endorsed]: Filed and entered Feb. 27, 1956.

[Title of District Court and Cause.]

PETITION OF PUBLIC ADMINISTRATOR AND OF HIS ATTORNEYS FOR ALLOWANCE OF EXPENSES OF DEFENSE, INCLUDING ATTORNEYS' FEES

Come now, W. A. Robison, as administrator of the estate of Robert Sidebotham, deceased; Frank J. Fontes and Delger Trowbridge, and petition the above-entitled Court for an allowance for the expenses of defending the above-entitled action, including attorneys' fees to Frank J. Fontes and Delger Trowbridge, and on this behalf allege as follows, to wit:

I.

That petitioner, W. A. Robison, as administrator, and his predecessor in interest, Phil C. Katz, as Public Administrator of the City and County of San Francisco, State of California, were duly appointed administrators of the estate of Robert Sidebotham, deceased, at all times after February 13, 1952, and said W. A. Robison is now acting as said

administrator. Frank J. Fontes at all times herein mentioned has been the regular attorney for Phil C. Katz and W. A. Robison, as said administrators, and Delger Trowbridge was appointed special counsel for Phil C. Katz and W. A. Robison as said administrators by an order of the Probate Department of the Superior Court of the State of California, in and for the City and County of San Francisco, some time in the month of February, 1952.

II.

That on the 10th day of October, 1952, the above-named plaintiff filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against Phil C. Katz, as administrator of the estate of Robert Sidebotham, deceased, et al., to quiet title to certain property described in said complaint, for an accounting and for an injunction, and she immediately thereafter filed a first amendment to said complaint. That said last mentioned papers were served on Phil C. Katz, as said administrator, shortly thereafter. That thereafter and during the month of February, 1953, said action was removed to the above-entitled court on the ground of diversity of citizenship, defendants Robert Sidebotham and James Sidebotham, the heirs at law, being residents of states other than the State of California.

III.

That thereafter petitioners Frank J. Fontes and Delger Trowbridge performed the following serv-

ices in defending said action. That said attorneys examined the following pleadings filed by the plaintiff as hereinafter set forth. Thereafter plaintiff filed her first amended complaint in said action and thereafter she filed her second amended complaint. Thereafter and on or about July 1, said attorneys served and filed their notice of motion to dismiss plaintiff's second amended complaint, which document, together with the memorandum of authorities attached thereto, was five pages long. That thereafter plaintiff filed her third amended complaint herein. Thereafter said attorneys filed a notice of motion to dismiss, which was granted, without leave to amend, by the Honorable Oliver J. Carter, a Judge of the above-entitled court. Thereafter plaintiff took an appeal from the said order dismissing her third amended complaint without leave to amend to the United States Court of Appeals for the Ninth Circuit. Said attorneys made a motion to dismiss said appeal on the ground of lack of diligence of plaintiff in prosecuting her appeal, which said motion was denied. Said attorneys then examined the record on appeal as proposed by plaintiff's attorney and were successful in having a more accurate and full record on appeal prepared. After plaintiff's attorney prepared and filed her opening brief, these petitioning attorneys prepared their brief on appeal and subsequently argued the matter before said United States Court of Appeals. After said United States Court of Appeals reversed said order of the Honorable Oliver J. Carter, these petitioning attorneys filed their petition for re-

hearing. Thereafter, and on or about March 17, 1955, these petitioning attorneys filed an answer on behalf of W. A. Robison, as said administrator, which answer was six pages long. Thereafter plaintiff filed an amendment to her third amended complaint and these petitioning attorneys filed an answer on behalf of said Public Administrator to the third amended complaint, as amended, which was six pages long. Thereafter these petitioning attorneys made a motion to inspect certain documents and also propounded certain written interrogatories to the plaintiff. Thereafter and on or about February 18, 1955, these petitioning attorneys attended the taking of the deposition of plaintiff in the City of Los Angeles, State of California, for which purpose petitioner Delger Trowbridge made a special trip from San Francisco, California, to Los Angeles County and a full day and night were expended by him in traveling to Los Angeles for the purpose of taking said deposition. That thereafter these petitioning attorneys made a motion to have the above-entitled cause set for trial. Thereafter this cause came on for trial and was tried before the above-entitled court on October 24, October 25, October 26 and October 27, 1955. On October 27, 1955, petitioner Delger Trowbridge argued said case before the honorable court and thereafter filed a written brief on behalf of said Public Administrator, which brief was 22 pages long. Thereafter plaintiff served on said Public Administrator proposed findings of fact and conclusions of law in the

above-entitled matter, and thereafter these petitioning attorneys proposed amendments thereto. Thereafter these petitioning attorneys prepared in open court on February 27, 1956, and presented their arguments in support of said proposed amendments to said findings of fact and conclusions of law.

IV.

W. A. Robison, as said administrator, and Phil C. Katz, his predecessor in interest as said administrator, have expended the following moneys in defending said action:

Expenses of printing brief on appeal.....	$115.14
Expense of printing petition for rehearing after decision on appeal	76.52
Expenses of taking deposition of plaintiff in Los Angeles, California, as follows:	
Reporter's fee	98.64
Traveling expenses of Delger Trowbridge	49.15
Reporter's fee for transcribing partially the proceedings at the trial of said action....	92.40

V.

The above-entitled action was defended by said Public Administrator through his counsel abovenamed in good faith and on reasonable grounds. The defense of said action was necessary for the proper protection and preservation of the properties and assets of Robert Sidebotham, deceased, in the possession of Phil C. Katz and W. A. Robison as administrators of said estate, and petitioners allege that said attorneys Frank J. Fontes and Del-

ger Trowbridge are entitled to a reasonable fee for their services incurred as aforesaid in the defense of said action. Petitioner W. A. Robison as said administrator alleges that the moneys expended as aforesaid by said Phil C. Katz and W. A. Robison were reasonably necessary for the proper defense of said action. This petition is made without prejudice to the right of these petitioners to make any further petition to the Probate Department of said Superior Court of the State of California, in and for the City and County of San Francisco for fees and expenses pertaining to this action.

/s/ FRANK J. FONTES,

/s/ DELGER TROWBRIDGE,

Attorneys for W. A. Robison, as Administrator of the Estate of Robert Sidebotham, Deceased, and Also as Copetitioners.

Duly verified.

[Endorsed]: Filed February 27, 1956.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR ALLOWANCE OF EXPENSES INCLUDING ATTORNEYS' FEES

The petition of W. A. Robison, Administrator of the Estate of Robert Sidebotham, deceased, and Frank J. Fontes and Delger Trowbridge, his attorneys, for an order allowing them the expenses of defending the above-entitled action, including attorneys' fees, having been presented and argued

this day, It Is Hereby Ordered that said petition be and it is hereby denied without prejudice.

Done in Open Court this 27th day of February, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge of the United States District Court.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that W. A. Robison, administrator of the estate of Robert Sidebotham, deceased, and Robert Sidebotham and James Sidebotham, and each of them hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of the plaintiff, signed and filed by the Honorable Michael J. Roche on February 27, 1956, and entered on the same day.

Dated: March 23, 1956.

/s/ FRANK J. FONTES,
/s/ DELGER TROWBRIDGE,
Attorneys for Defendant, W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

/s/ THEO. M. MONELL,
Attorney for Defendants, Robert Sidebotham and James Sidebotham.

[Endorsed]: Filed March 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant, W. A. Robison, administrator of the estate of Robert Sidebotham, deceased, and Frank J. Fontes and Delger Trowbridge, his attorneys, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order denying the petition of W. A. Robison, administrator of the estate of Robert Sidebotham, deceased, for the allowance of expenses of defense including attorneys' fees incurred by him in the above-entitled court on behalf of the estate of Robert Sidebotham, deceased, signed and filed by the Honorable Michael J. Roche on March 27, 1956, and entered on the same day.

Dated: March 27, 1956.

/s/ FRANK J. FONTES,

/s/ DELGER TROWBRIDGE,

Attorneys for Defendant, W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that W. A. Robison, Administrator of the Estate of Robert

Sidebotham, Deceased, as Principal, and $250.00 cash tendered by him into the Registry of the Court this date, is held and firmly bound unto Helen Marceau Sidebotham, the plaintiff in the above-entitled action, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said plaintiff; to which payment, well and truly to be made, I bind myself by these presents.

Dated this 27th day of March, 1956.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Helene Marceau Sidebotham, plaintiff, and W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, James Sidebotham and Robert Sidebotham, a judgment was rendered against the said defendants on February 27, 1956, and the said defendants having filed a notice of appeal from said judgment in said Court, now said bond is conditioned to secure the payment of plaintiff's co ts on appeal if the appeal is dismissed or the judgment affirmed or of such costs as the United States Court of Appeals may award if the judgment is modified.

/s/ W. A. ROBISON,
Administrator of the Estate of Robert Sidebotham,
Deceased.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, as Principal, and $250.00 cash tendered by him into the Registry of the Court this date, is held and firmly bound unto Helen Marceau Sidebotham, the plaintiff in the above-entitled action, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said plaintiff; to which payment, well and truly to be made, I bind myself by these presents.

Dated this 27th day of March, 1956.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Helen Marceau Sidebotham, plaintiff, and W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, James Sidebotham and Robert Sidebotham, an order was made denying petition of said W. A. Robison as said Administrator and Frank J. Fontes and Delger Trowbridge, his attorneys, applying for the allowance of the expenses of defending the above-entitled action, including attorneys' fees, by an order made and filed herein on March 27, 1956, now said bond is conditioned to secure the payment of plaintiff's cost on appeal if the appeal is dismissed or the order affirmed or of such costs as the United States

Court of Appeals may award if the order is modified.

/s/ W. A. ROBISON,
Administrator of the Estate of Robert Sidebotham, Deceased.

[Endorsed]: Filed March 27, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 32531

Before: Hon. Michael J. Roche, Judge.

HELENE MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, et al.,

Defendants.

REPORTER'S TRANSCRIPT

Monday, October 24, 1955

Appearances:

For the Plaintiff:
MANUEL RUIZ, JR., ESQ.

For the Defendant Robison:
DELGER TROWBRIDGE, ESQ.

For Defendants Sidebotham:
THEODORE M. MONELL, ESQ.

* * *

Mr. Monell: We offer in evidence first, and in accordance with our agreement, I will read the statement of claim and then we will supply certified copies. Is that satisfactory to you, Mr. Ruiz?

Mr. Ruiz: Yes.

Mr. Monell: This is headed: "In the Matter of the Estate of Robert Russell Sidebotham, Deceased, No. 123669, in the Superior Court of the State of California in and for the City and County of San Francisco." The document is entitled: "State of Claim of Interest in Estate Pursuant to Probate Code 1080.

"Helene Marceau Sidebotham, respectfully presents this her written statement setting forth her interest in the estate of Robert Russell Sidebotham, deceased, and alleges as follows:

I.

"That Robert Russell Sidebotham died intestate during the month of December, 1951.

II.

"That Phil C. Katz, has been appointed by the above Court as administrator of the Estate of said deceased, and he is now the duly qualified and acting administrator of said estate. [14*]

III.

"That notice to creditors in the manner required by law has been given and the time to file and present claims against the estate has expired, but the estate is not in a condition to be closed.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

IV.

"That the only heirs of said decedent, other than petitioner, as hereinafter set forth are, two sons, to wit: Robert Sidebotham and James Sidebotham, by a former marriage of decedent.

V.

"That said estate consists of community property only, as well as increase thereof, all of which constitutes property of petitioner, by virtue of the following facts:

"a. That plaintiff and decedent were married in the City of Tijuana, Lower California, Mexico, on May 30, 1928. That petitioner and decedent were at all times husband and wife, commencing on May 30, 1928, up to and including the 14th day of November, 1946. That on the 14th day of November, 1946, said marriage was dissolved by a Court of competent jurisdiction.

"b. That the matrimonial domicile of the [15] petitioner and decedent was at all times the State of California.

"c. That during the marriage decedent accumulated and acquired real and personal property, consisting in excess of $75,000.00 cash, on deposit in banks within the State of California, including real estate and other properties, nature and extent of which property is unknown to petitioner, and as soon as the same is ascertained, petitioner will ask leave of Court to insert the same herein, by way of amendment.

VI.

"That said community property, has never been partitioned, either by agreement of petitioner and decedent, judicial decision, or otherwise; and upon the death of decedent, petitioner became entitled to receive one-half thereof by survivorship, and retain the other half thereof, which she at all times has owned from the moment of its acquisition during the marriage.

"Wherefore, petitioner prays that the Court determine that she is entitled to said property of said estate above set forth and that a judgment and decree of the Court be made accordingly.

"/s/ MANUEL RUIZ,
"Attorney for Petitioner."

Verified.

"State of California,
"County of Los Angeles—ss.

"Helene Marceau Sidebotham being by me first duly sworn, deposes and says: that she is the Petitioner in the above entitled action; that she has read the foregoing State of Claim of Interest in Estate Pursuant to Probate Code 1080 and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

"/s/ HELENE MARCEAU
SIDEBOTHAM.

"Subscribed and sworn to before me this 3rd day of December, 1952.

"MANUEL RUIZ,
"Notary Public in and for Said County and State of California."

With the notarial seal, bearing his signature and bears a filing mark "Filed December 4, 1952, Martin Mongan, Clerk; D. F. Breen, Deputy Clerk," and bears a note that it was set for hearing on March 9, 1953, reset April 13, 1953, and reset with a blank date.

We further then wish to introduce and read into evidence the Decree Establishing Heirship, which bears the filing mark [17] "Filed December 14, 1953, Martin Mongan, Clerk, by P. L. Clavere, Deputy Clerk."

This is also entitled in the same court.

"In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased, No. 123669, Department No. 9.

"Decree Establishing Heirship

"The petition of Robert E. Sidebotham and James J. Sidebotham praying that the court determine who are entitled to distribution of the estate of Robert Russell Sidebotham, alias, deceased, came on reguarly for hearing this day. Proof is made to the satisfaction of this court, and the court finds that notice of the time and place of the hearing of said petition has been regularly given in accordance with

the provisions of Section 1200 of the Probate Code, and also to all persons requesting special notice of the matters specified in Section 1202 of the Probate Code.

"It appears that Robert E. Sidebotham and James J. Sidebotham have appeared herein by their attorney within the time allowed, and have filed herein their written statement setting forth their respective claims of interest in said estate, and that Helene Marceau Sidebotham also appeared by her petition filed herein on the 4th day of December, 1952,

"Wherefore, the court proceeds to hear the petitions of both Robert E. Sidebotham and James J. Sidebotham, and of Helene Marceau Sidebotham, and after hearing the evidence and [18] arguments of counsel, the court determines as follows, to wit:

"It Is Ordered, Adjudged and Decreed by the court that Robert Russell Sidebotham, alias, died intestate on the 21st day of December, 1951, leaving surviving as his only heirs at law and the only persons entitled to distribution of said estate Robert E. Sidebotham and James J. Sidebotham, the sons of said decedent; that thereupon the estate of said decedent descended to his said heirs at law and is now vested in them, subject to administration, share and share alike, and each of said persons is entitled to distribution of one-half of said estate when said estate shall be in a condition to be closed.

"It Is Further Ordered, Adjudged and Decreed that the petition of Helene Marceau Sidebotham be and the same is hereby denied.

"Done in Open Court this 10th day of December, 1953.

"/s/ T. I. FITZPATRICK,
"Judge of the Superior Court."

The record shows that no appeal has been taken from the order made and that the order has by lapse of time become final.

For the purpose of the record, I would like to offer the petition and the decree establishing heirship mentioned as exhibits in this matter and to be numbered when the certified copies are produced. And they may be considered as exhibits on behalf of all the defendants and bear the number 1 or A, whatever procedure the court follows. [19]

Mr. Clerk, do defendants' exhibits bear numbers or letters?

The Clerk: They will bear letters.

The Court: Pardon me. I would like to hear from counsel.

Mr. Ruiz: We would assume from the reading of the petition and the judgment of the Court that there was a hearing had on this matter, but counsel for plaintiff was not only not present by Mrs. Sidebotham was not present, and the recital to the effect that evidence was taken and so forth and so on did not occur insofar as Mrs. Sidebotham was concerned.

She filed a petition under a specific Probate Code Section, 1080, where she asserted that she was an heir under that particular and specific probate sec-

tion of the law. As the Court knows, the Probate Court is not a court of general jurisdiction and by its jurisdiction was limited and has always been limited to a determination of who are the heirs at law and nothing else.

As soon as the plaintiff in this action ascertained that she was in the wrong court, she instituted an independent action in the Superior Court, which was one of general jurisdiction, where her claims, not as an heir, but her claims as a tenant in common of certain property which was community property at the time that she was married to him and later became a tenant in common upon the dissolution of the divorce could be properly heard. [20]

Counsel representing the estate then made a motion to remove that matter from the state court to the District Court and we have been working on that up until today.

By virtue of the fact that the petition was improperly filed, nothing else was done with respect to that matter in the Probate Department. It indicates that counsel appeared and had a nice little default, and now they want to claim that that is a bar of her claims in this action.

With respect to the law, that the wife acquires, assuming that even she had been married to him—that she doesn't acquire a new right or interest generated in her by virtue of the death of her husband. Death merely affords the occasion of the termination of the husband's interest in the community property but doesn't do anything with re-

spect to her present vested interest which she always had. In other words, the wife's share belongs to her at the moment of its acquisition and not that she inherits anything from him.

If she had been married to him at the time he died and it was all community property, she would be entitled to received a hundred per cent of the estate. But she is not seeking a hundred per cent of the estate here. She is going back to 1946 and making certain allegations with respect to the fact that upon a dissolution of that marriage she then became tenants in common with him with respect to property that had been acquired theretofore and remained tenants in common with him with respect [21] to its additions thereafter, and therefore she has to sue not in the Probate Court but she has to sue in another action. And that is the situation here.

Where a final decree of divorce makes no disposition of community property, the view is that after the divorce the parties are tenants in common. And that is before this Court.

Mr. Monell: If the Court please, I should perhaps supplement, in view of counsel's statement, the document in evidence with an affidavit of mailing which was filed in the Probate Court in this same matter on December 10th, 1953. Shall I read the affidavit or would you prefer me to summarize it?

The Court: You may read it.

Mr. Monell: Thank you, your Honor. It is entitled:

"In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased, No. 123669, Department No. 9.

"Affidavit of Mailing

"State of California,
"County of Marin—ss.

"June Tanforan, being sworn, deposes and says: That she is a citizen of the United States, over 18 years of age, a resident of Marin County, and not a party to the within-action. That affiant's business address is 1539 Fourth Street, San Rafael, California; that affiant served a copy of the attached Notice of Hearing Petition to Determine Heirship by [22] placing a copy of said petition in an envelope addressed to Mr. O. A. Arthur, c/o Morris Lowenthal, 244 California Street, San Francisco, California; and a copy in an envelope addressed to H. J. Jepsen, 963 Mills Building, San Francisco, California; and a copy in an envelope addressed to Lloyd H. Burke, 422 Post Office Building, 7th and Mission Streets, San Francisco 1, California; and a copy in an envelope addressed to Manuel Ruiz, Jr., 704 So. Spring Street, Los Angeles 14, California; and a copy in an envelope addressed to W. A. Robison, Public Administrator, Room 463, City Hall, 400 Van Ness Avenue, San Francisco, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on November 25, 1953, deposited in the United States mail at San Rafael, California.

"That there is delivery service by United States mail at the places so addressed, or regular communication by United States mail between the place of mailing and the places so addressed.

"/s/ JUNE TANFORAN.

"Subscribed and sworn to before me this 25th day of November, 1953.

"FRANK B. PEEBLES,
"Notary Public in and for
Said County and State."

With the notarial seal attached.

The notice of hearing which is attached is dated —file marked March 27, 1953, Martin Mongan by D. F. Breen, Deputy Clerk. [23]

"In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased. Notice of hearing."

I was reading from the wrong notice of hearing, your Honor. It bears the file stamp "Filed November 27, 1953, Martin Mongan, Clerk, by D. F. Breen, Deputy Clerk."

Entitled "In the Matter of the Estate of Robert Russell Sidebotham."

"Notice of Hearing Petition to Determine Heirship

"Notice is hereby given that on the 9th day of March, 1953, Robert E. Sidebotham and James J. Sidebotham filed their petition in this court alleging that they are the heirs at law of Robert Russell Sidebotham, the above-named deceased, and pray-

ing that the rights of all persons interested in the estate of said Robert Russell Sidebotham, deceased, be ascertained and declared by this Court, and that it be determined to whom distribution thereof should be made.

"All persons who have or claim any interest in said estate are hereby notified that a hearing of said petition and of any objection thereto that may have been presented will be held before this Court in Department No. 9 thereof at the City Hall, 400 Van Ness Avenue, City and County of San Francisco, State of California, on the 10th day of December, 1953, at 10 o'clock a.m. of said day, at which time and place all persons interested may appear and show cause, if any they have, why such petition should not be granted and such order made. [24] Reference is hereby made to said petition for further particulars.

"Notice is further given that any person may appear and file with the clerk a written statement setting forth his interests in said estate.

"MARTIN MONGAN,
"Clerk,

"By D. F. BREEN,
"Deputy Clerk."

Our contention, if the Court please, is that by virtue of that hearing there was a decision made by the Probate Court by which this particular petitioner is bound, and the law upholds our contentions in that respect.

The Court: Was she served?

Mr. Monell: She filed her own statement, if the Court please, of her interest, which I first read to your Honor, the one that was filed in February in which she said she claimed the entire estate "by virtue of the following facts"—and those are the same facts of which she alleges here.

Although the Probate Court is not a court of general jurisdiction as such, it is a court, as Mr. Justice Schenk has said in a recent decision of the Supreme Court, a court of general jurisdiction; but in estate and probate matters it may not decide certain extraneous matters, such as claims of outsiders to property within the estate. [25]

* * *

The Court: Do you wish to present this file or what do you wish to do?

Mr. Monell: We are going to submit copies of the documents which have been read in evidence so that the clerk may take these originals.

The Court: Very well.

Mr. Monell: Without disturbing the files.

The Court: Very well. Let them be admitted and marked.

The Clerk: The copy of the claim is Defendants' Exhibit A, and the copy of the decree is Defendants' Exhibit B, admitted in evidence.

Mr. Monell: Then the notice of hearing will be part of B and the affidavit of mailing will be part of B. We will submit those.

Mr. Ruiz: Just one clarification I would like to make.

Counsel stated this matter was heard in the Probate Court and that the plaintiff being dissatisfied with the ruling thereupon instituted an action before the same court in another department. That is not so, your Honor. The facts indicate that both of these actions were more or less—that is to say, the claim as an heir was put in, and this suit was instituted in the court of general jurisdiction, at approximately the same [27] time; that thereafter, by virtue of the jurisdictional limitation of the Probate Court, the plaintiff proceeded on this action and has continued until today.

The Court: So stipulated?

Mr. Monell: We will stipulate that the two actions were pending at approximately the same time, your Honor.

Mr. Ruiz: Very well.

Mr. Monell: We do maintain that the judgment of the Superior Court in the probate matter is binding upon the plaintiff in this matter.

The Court: Very well; let the record so show.

Mr. Monell: And it is binding, of course, in this court, and we are asking at this time for a judgment under Section 597 under our defense that the plaintiff was foreclosed from further proceeding.

The Court: Very well. Call your first witness.

Mr. Monell: For the purpose of the record, if the Court please, are you denying our motion?

The Court: No. You offered it in evidence, did you?

Mr. Monell: We make a motion at this time for judgment and that plaintiff be foreclosed from proceeding further by reason of the adverse ruling.

The Court: For the purpose of the record, the motion will be denied at this time. [28]

HELENE (MADELINE) MARCEAU SIDEBOTHAM

the plaintiff herein, called as a witness in her own behalf; sworn.

The Clerk: State your full name, your occupation and your address to the Court.

A. Madeline Sidebotham, 6 Pollard, San Francisco.

Direct Examination

By Mr. Ruiz:

Q. You are the plaintiff in this action? You are the complaining party?

A. Yes, I am. Yes, I am.

Q. Did you know Robert Sidebotham during his lifetime? A. Yes, I did.

Q. And did you marry him?

A. Yes, I did.

Q. And when and where did you marry him?

A. Tijuana, Mexico.

Q. And when was that?

A. May 28th—no, May 30, 1928.

Mr. Ruiz: At this time I would like to offer into evidence a marriage certificate of the marriage record in Tijuana under the signature of the United Staes Consul by the Vice Consul of the United

(Testimony of Helene Marceau Sidebotham.)

States of America, William A. Carsey at Tijuana, Baja California, Mexico, as Plaintiff's first exhibit.

Mr. Trowbridge: It is in Spanish, your Honor. We don't [29] object to its going in evidence subject to examination.

The Court: Subject to any correction, let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 1 admitted in evidence.

(Marriage certificate referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Ruiz): Did you thereafter live with him as husband and wife?

A. Yes, I did.

Q. How long were you marired to him?

A. Up until 1946, November.

Q. At that time did you procure a divorce from him? A. Yes, I did.

Q. In what state? A. Nevada.

Q. At the time of said divorce, did you know whether there was any community property of the marriage? A. I didn't know.

Q. Prior to the divorce, when was the last time you saw him? A. 1941.

Q. And where was that?

A. It was in San Francisco.

Q. Do you recall the particular address?

A. Union Street. [30]

Q. Do you have a number? A. 380.

(Testimony of Helene Marceau Sidebotham.)

Q. Union Street here in San Francisco?

A. In San Francisco.

Q. Between that time and the year 1946 when you went to Nevada, did you see him?

A. Between 1941 and 1946?

Q. Yes. A. Yes, I did.

Q. You did? Between 1941 and 1946?

A. Oh, no, no, not in 1941, no.

Q. Pardon? A. No.

Q. You didn't see him between 1941 and 1946 before you went to Nevada; is that your testimony, or isn't it? A. Yes.

Q. Did you know during that period of time where he was? A. No, I didn't know.

Q. Now, the last time that you saw him, did you have a conversation with him?

A. Yes, I did.

Q. Where was that?

Mr. Monell: When?

Mr. Ruiz: I will get to when pretty soon, counsel.

Q. Where was it? [31]

A. It was at the Hansa Hotel.

Q. You saw him at the Hansa Hotel?

A. Yes.

Q. In 1946? A. Yes. Not in 1946.

Q. 1941? A. Yes.

Q. What part of 1941?

A. In summertime.

Q. Now, prior to the last time you saw him in the summer of 1941 did you ever discuss money

(Testimony of Helene Marceau Sidebotham.)

matters with him?

A. Yes, we did.

Q. Did you ever discuss business with him?

A. No, no business.

Q. What money matters, if any, did you discuss?

A. Well, I asked him about the rent and the expenses and bills and things to live on.

Q. Did he pay rent for you?

A. Yes, he did.

Q. Did he take care of some of your expenses?

A. Part of them.

Q. Did he ever ask you for money?

A. Yes, he did.

Q. When was that?

A. Well, it was around 1938 he borrowed a hundred dollars [32] from me.

Q. Did you have a conversation about that time?

A. Yes, he said he was in trouble and he needed some money. He was in trouble with various people.

Q. Did he tell you what trouble he was in?

A. Not exactly. He said he was in trouble and he had to go to jail.

Mr. Monell: I will object upon the ground that it is incompetent, irrelevant and immaterial.

Mr. Trowbridge: We will join in that objection.

The Court: Was this a conversation?

The Witness: Yes.

Mr. Ruiz: Yes, about money.

The Witness: Yes; when he borrowed the hundred dollars from me, he explained to me what it was for and he told me he would give it back to me.

(Testimony of Helene Marceau Sidebotham.)

Mr. Monell: There is no materiality here.

The Court: You are entitled to the conversation, whatever it may be, in relation to the hundred dollars. Objection will be overruled.

The Witness: And he told me he would give it back to me as soon as he makes and gets some money.

Q. (By Mr. Ruiz): Did you ever ask for that money? A. Yes, I did.

Q. On more than one occasion? [33]

A. Yes, every time I saw him.

Q. And what would he say?

A. He said he was broke and he had a hard time.

Q. Did you believe him?

A. I believed him.

Q. After you were married, where did you first live?

A. We lived in Los Angeles on Bi[illegible] Street.

Q. Did you thereafter come up to San Francisco?

A. Well, we moved—we went different places. We lived different places before we came to San Francisco.

Q. Did you always live in the State of California? A. Yes, we did.

Q. When did you first come up to San Francisco?

A. In 1935. Oh, the first when we came from New York?

Q. No, after you were married and after you

(Testimony of Helene Marceau Sidebotham.)

lived in the southern part of the state, Los Angeles, when did you first come to live in San Francisco? A. 1935.

Q. And from the date of your marriage, 1928, to the year 1935, did you live in the southern part of the State of California? A. Yes, sir.

Q. Well, when you came up to San Francisco around 1935, were you and Mr. Sidebotham happily married? A. Yes, we were. [34]

Q. Where was he working at that time?

A. I believe in Santa Barbara at that time.

Q. I am going to show you a letter and ask you to identify the handwriting on this letter. Whose handwriting is that? A. That is his writing.

Q. By "his" you mean Mr. Sidebotham's?

A. Yes, Mr. Sidebotham's.

Q. When did you first see that letter recently?

A. I found it Saturday. I gave it to you Saturday.

Q. Where was it?

A. It was in a folder, a picture folder, with his picture on top.

Q. And do you recall him having sent you that letter? Do you recall him sending you that letter?

A. Yes, I remember; yes.

Q. And where was he working at that time?

A. I think he was in Santa Barbara at that time.

Q. And where were you living at that time?

A. Los Angeles.

(Testimony of Helene Marceau Sidebotham.)

Q. And that was just before you came to San Francisco? A. Yes.

The Court: He was working where, at that time?

The Witness: At Santa Barbara.

The Court: What kind of work, if you know?

The Witness: He was—I don't know exactly if he was selling property [35] or stocks; I can't recall what he was doing.

Q. (By Mr. Ruiz): By the way, during the time you were married to him, what was his occupation generally?

A. He did various things. He sell properties and selling all kinds of stocks and things like that.

Q. Stocks? A. More or less.

Q. Bonds?

A. Bonds, stocks, real estate.

Q. Did he promote oil deals?

A. Well, I believe he did, too, but he never told me anything about his business because he said I never understood.

Mr. Ruiz: At this time I would like to offer this in evidence and read it.

Mr. Monell: What is the date of it?

Mr. Ruiz: September 20th, Thursday.

Mr. Monell: What year?

Q. (By Mr. Ruiz): What year was this?

A. It must be about 1935.

Q. 1935?

A. Because that was before we came to San Francisco.

(Testimony of Helene Marceau Sidebotham.)

Mr. Ruiz: I will read the letter.

(Whereupon, Mr. Ruiz read the letter.)

The Court: Is this offered in evidence?

Mr. Ruiz: It is offered in evidence. [36]

The Court: It will be admitted and take the next number.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Whereupon, letter dated September 20th, Thursday, was received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Ruiz): Mrs. Sidebotham, did you ever know your husband by the name of George W. Anderson? A. No, sir.

Q. Did you ever know your husband by the name of George William Brown? A. No, sir.

Q. Did you ever know that your husband used the name George W. Fenton? A. No, sir.

Q. Did you know him to use the name of Edward W. Hutton? A. No, sir.

Q. Or Edward Hutton? A. No, sir.

Q. Or E. W. Hutton? A. No, sir.

Q. Or W. H. Jackson? A. No, sir.

Q. Or Russell Robert Smith? [37]

A. No, sir.

Q. Or George R. Stone? A. No, sir.

Q. Or George W. Thompson? A. No, sir.

Q. Did you ever know him to use the name or know him by the name of W. H. Towner?

A. No, sir.

(Testimony of Helene Marceau Sidebotham.)

Q. Or William Towner? A. No, sir.

Q. Now, at the time you procured your divorce in Nevada, you state in your pleadings in this case, Mrs. Sidebotham, that you did not know whether there was any community property. Do you remember that you signed a complaint for divorce in Nevada?

A. I don't remember. I must have signed something, but I don't remember.

Q. At the time of that hearing of the trial, was there any question asked of you whether there was any community property?

Mr. Monell: I will object on the ground that it calls for hearsay. The record of the court proceedings is the best evidence.

Mr. Trowbridge: I will join in that objection.

The Court: If she knows, she may answer. The objection [38] will be overruled.

A. They never asked me anything about community property.

Mr. Ruiz: Very well.

Q. Did you find out during the course of this case that you had signed a complaint in Nevada and that complaint had said that there was no community property?

Mr. Monell: I will object upon the ground that it is leading, if the Court please, and suggestive.

The Court: She may state whether or not she did. The objection will be overruled.

A. I have been told that I had signed.

Q. (By Mr. Ruiz): Who told you?

(Testimony of Helene Marceau Sidebotham.)

A. My—you did.

Q. Now, when was that?

A. When the case was on; I think it was in July, '53. I was surprised. I didn't know I had signed it.

The Court: It is 12:00 o'clock. We will take a recess until 2:00 o'clock.

(Whereupon, an adjournment was taken to 2:00 o'clock p.m.) [39]

Monday, October 24, 1955—2:00 P.M.

HELENE (MADELINE) MARCEAU SIDEBOTHAM

resumed the stand.

Direct Examination
(Continued)

By Mr. Ruiz:

Q. I believe you testified that you found out during the course of this case that you had signed a Nevada complaint to the effect that there was no community property and that that was around July, 1953? A. Yes.

Q. Is that correct? A. Yes, that's right.

Q. That action in Nevada was on publication, was it? A. Yes, sir.

Q. Did you know the whereabouts of Mr. Sidebotham? A. No, I didn't know where he was.

Q. When you last talked to him, did you have a conversation? A. Yes, I did.

(Testimony of Helene Marceau Sidebotham.)

Q. As to when he would see you? A. Yes.

Q. What did he say?

A. He said for me to wait for him and he will come back, and as soon as he come back we go to South America together. He wanted to buy a plantation and retire.

Q. He told you to stay put, in other words? [40]

A. Yes, he told me to stay—wait for him.

Q. Mrs. Sidebotham, if you had known that Mr. Sidebotham had accumulated money and property, would you have in that Nevada action tried to get your share of it? A. Of course.

Mr. Monell: Just a moment. I will object to that on the ground that it is incompetent, irrelevant and immaterial and argumentative.

The Court: I will allow it.

Mr. Trowbridge: I will join in the same objection.

The Court: Objection overruled.

Mr. Ruiz: I believe the answer is in.

The Court: What is the answer?

A. I said, "Of course."

Q. (By Mr. Ruiz): Why didn't you do anything in this respect?

A. Because he told me he was broke all the time, so what is the use to talk about it.

Q. Did you believe that he was broke all the time? A. I believed him, yes.

Q. Did you know that he was hiding money and property under different names?

Mr. Monell: Just a moment. I will object upon

(Testimony of Helene Marceau Sidebotham.)

the ground that there is no foundation laid, no showing that any money has been hidden. [41]

Mr. Ruiz: I will strike out the word "hiding" and reframe the question.

Q. Did you know that he had any money in names other than Robert Sidebotham?

Mr. Monell: I will object on the ground that that has not been shown.

Mr. Trowbridge: Same objection.

The Court: In what respect has the foundation not been laid?

Mr. Monell: There is no showing that there was any money under any other name or under any name at all.

The Court: It indicates that you are assuming a fact not in evidence.

Mr. Ruiz: Very well. You may cross-examine.

Cross-Examination

By Mr. Trowbridge:

Q. Mrs. Sidebotham, where were you born?

A. In Canada.

Q. Where in Canada?

A. Quebec, Canada; Province of Quebec.

Q. Any particular part? A. St. Mary's.

Q. What is that? A suburb or what?

A. It is outside of the big city. It is not a great big city.

Q. And how old are you?

A. I am born in 1903. [42]

(Testimony of Helene Marceau Sidebotham.)

Q. And when did you come to the United States?

A. 1925. I am not exactly sure; I think it is 1925 or '26.

Q. When did you first meet Mr. Sidebotham?

A. I met him in New York City.

Q. About when? A. 1926.

Q. About 1926? A. About '26.

Q. And what was your occupation then?

A. I was living with my brother. I came to visit my brother and I stayed there for a while.

Q. Did you have any work in New York City?

A. Well, I had a few kids that they wanted to learn how to speak French and I taught a little bit French to the kids and I was keeping house for my brother.

Q. What was the occupation of Mr. Sidebotham then? A. Well, he was selling stock.

Q. Do you know what kind of stock?

A. I don't know anything about stocks. I know he had a stock office—a stock company.

Q. How long did you stay in New York City?

A. We stayed a few months.

Q. "We"—you mean you and Mr. Sidebotham?

A. I stayed at my brother's.

Q. You saw Mr. Sidebotham quite often in New York City? [43]

A. Yes, I was taking care of his mail. I used to go down to his office because he was closing up and he used to say, go and pick up his mail and his messages.

Q. How long did that go on?

(Testimony of Helene Marceau Sidebotham.)

A. Well, if I remember, about six months; maybe less, maybe more. I can't remember.

Q. Where was his office?

A. I believe now that was on 42nd and Broadway or something like that.

Q. He had an office there and you went to his office?

A. Yes, I went to his office.

Q. And opened his mail and received telephone messages from him?

A. I didn't open his mail. I just brought it to him because he was closing up on the outside.

Q. You took messages for him, you say?

A. I took messages from his clerks. He had two or three men over there; he was not alone, and they gave me the letters for him.

Q. That went on for about six months?

A. About. I couldn't say exactly.

Q. And then where did you go?

A. To Boston. He said he had to go to Boston and we going to get married in Boston.

Q. Were you married in Boston? [44]

A. No; he said no, he was busy and we had to go some place else.

Q. Well, were you married in New York City to him?

A. I had never been to a ceremony, no, because he was busy. He said we would go some place else and get married.

Q. You allege in one of your complaints you were married to him in New York City on January 1, 1927. Is that right?

(Testimony of Helene Marceau Sidebotham.)

A. I don't know, sir. It was up to my lawyer to find that out.

Q. Well, you should know whether you were married to him.

A. If you are married to a man you got to go through a ceremony.

Q. You allege in one of your complaints you were married on January 1, 1927. I would like to know more about it.

Mr. Ruiz: Just a minute. For the purpose of an objection, the complaint has been amended to allege the ceremonial marriage, which ceremonial marriage is in evidence. Originally there was a complaint that made reference to a common law marriage as of a prior date. That was stricken from the complaint and is no longer material in this case, and for that reason I have given counsel an opportunity to develop it, but it will not come to anything because it is not alleged in the complaint on file that she was married to him on January 1, 1927, or whatever it was, but that she was married in 1928 in Tijuana. [45]

Mr. Trowbridge: Well, the third amended complaint which is the one that the suit is proceeding under says in paragraph 2 of the third cause of action that she was married to decedent, Robert Sidebotham, on January 1, 1927, and that is why I am asking you something about this marriage.

A. Well, we were here——

Mr. Ruiz: Just a moment, please. Counsel and I have had many discussions about this matter. We

(Testimony of Helene Marceau Sidebotham.)

have even crossed correspondence on this matter and I have gone on record on the deposition in this matter. It has been stipulated that the only marriage involved in here was the ceremonial marriage in Tijuana. Then counsel raised the question that there possibly was an ambiguity. We had more discussion along that line. And then counsel wanted to know whether I was going to waive the prior marriage that was alleged as a common law marriage, and I went on record and said we were waiving it. There is only one marriage involved here. Now, if counsel wants to develop the fact that this lady lived with Mr. Sidebotham before the marriage, it may be all right, but I don't think it is material.

Mr. Trowbridge: I am not going into this because of the fact that they may or may not rely on this marriage, but I am trying on cross-examination to develop a picture here as to her memory and her trustworthiness and so on, et cetera. I think I have a right to go into it. She swore to it in her [46] third amended complaint.

The Court: The objection will be overruled. You may proceed.

Q. (By Mr. Trowbridge): Is it correct to say that this marriage on January 1st, 1927, was what you call a common-law marriage?

A. We were here in 1927. We were not in New York.

Q. No, January 1st, 1927. That was New Year's Day.

A. Yes, we were in San Francisco.

(Testimony of Helene Marceau Sidebotham.)

Q. Apparently you don't remember.

A. I think you said '26.

Q. No; it says in your complaint January 1, 1927, but I will drop it as far as that is concerned.

A. I could check that up easily.

Q. It isn't worth taking up any more time on. You were in Boston how long with Mr. Sidebotham? A. About six months.

Q. Then where did you go?

A. We came to California.

Q. Where in California?

A. San Francisco first.

Q. About when did you arrive in San Francisco?

A. That must have been about '27 or before '27.

Q. Well, what part of '27, if you can remember, not by day; was it summer, fall—— [47]

A. No, it was during Christmas time.

Q. Well, then, how long were you in San Francisco?

A. Well, he was working here for a company, an insurance company, I believe; then we went to Los Angeles.

Q. How long after you arrived in San Francisco before you went to Los Angeles?

A. How long we lived in San Francisco, you mean?

Q. Yes.

A. Well, we must have stayed a few months because he had to finish up with this other company.

Q. And you went to Los Angeles? A. Yes.

(Testimony of Helene Marceau Sidebotham.)

Q. And I believe that you alleged in another complaint that you were married in Tijuana on May 30th, 1928. Is that correct? A. Correct.

Q. And you have introduced in evidence here a certified copy of your marriage certificate in Tijuana, Mexico. Do you remember what place you gave as your place of birth to the marriage officer in Tijuana? A. Yes.

Q. What place did you say?

A. In Tiajuana.

Q. When you were married, isn't it a fact that the marirage officer—I think his name was Miranda —Francis L. Miranda— [48] ask you where you were born? A. He didn't ask any questions.

Q. Mrs. Sidebotham, I will show you a two-page paper here in writing. A. Yes.

Q. And there is a name there? A. Yes.

Q. I think it is your name. Is that your signature?

Mr. Ruiz: Just a moment, please. For the purposes of an objection, counsel has what purports to be a photostatic copy of some document. There is no proper foundation laid for even examining the document because—I assume that it purports to be some public document—it is not properly identified for the purpose of questioning. It is written in a foreign language; it is not properly authenticated, and for that reason, until such time as a proper foundation for that document is made, I think it is improper to interrogate the witness with respect to the same.

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: I am simply asking if that is her signature on the bottom.

Mr. Ruiz: I object to that because of the fact that it is a photostatic copy; on the face of it, it is not an original; it appears to be some sort of a photograph. I don't know whether it is superimposed. I don't know anything about this [49] document.

The Court: Can you lay a better foundation?

Mr. Trowbridge: No, your Honor. That is a Mexican document and that is a photostatic copy of it. It is actually a duplicate of this one that is already in evidence.

The Court: Is that in English?

Mr. Trowbridge: No, but I have a translation.

The Witness: In Spanish.

Mr. Trowbridge: This is in Spanish as well as Plaintiff's Exhibit 1, which is the marriage certificate in evidence.

Mr. Ruiz: If this be a duplicate——

Mr. Trowbridge: It is a duplicate.

Mr. Ruiz: I have no objection to reading what is in evidence and what it says.

Mr. Trowbridge: Well, I will get the translation, your Honor.

The Court: Did you put this in evidence?

Mr. Ruiz: I put the certified copy authenticated by the American Consul in evidence.

The Court: I will allow the testimony, limited to the signature.

Mr. Ruiz: No; the certified copy does not have

(Testimony of Helene Marceau Sidebotham.)

any signature on it. There is no signature on this.

The Court: It is identical with the copy that he has offered in Spanish?

Mr. Ruiz: There is a photostatic copy of some document [50] here in Spanish.

Mr. Trowbridge: That is the same thing.

The Court: Photostatic copy of this?

Mr. Trowbridge: Yes, sir; same thing.

Mr. Ruiz: It is not a photostatic copy of this. This is printed.

Mr. Trowbridge: That is the certified copy.

Mr. Ruiz: This is a certified copy of a document. It is authenticated by the American consul under the United States Seal.

Mr. Trowbridge: The wording—it is word for word exactly the same.

Mr. Ruiz: This is a document that has been photographed and appears to be——

The Court: An official document?

Mr. Ruiz: No, it does not appear to be an official document. There is nothing there that indicates it is an official document on the face of it.

Mr. Trowbridge: I will give your Honor the translation of it. It is proceedings of the alleged marriage of the plaintiff.

The Court: I will allow it subject to counsel's motion to strike. You may proceed. I will overrule the objection of counsel.

Mr. Trowbridge: I will ask you if that is a [51] correct translation?

Mr. Ruiz: Am I an expert?

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: You speak Spanish very fluently, don't you?

The Court: I know that he is a master of Spanish.

Mr. Ruiz: Thank you, your Honor.

Mr. Trowbridge: Possibly, in order to save time, we might leave that until the 3:00 o'clock recess if you want.

Mr. Ruiz: Very well. Here you are, counsel.

Q. (By Mr. Trowbridge): Now, after this marriage on May 30, 1928, you went to Tijuana with Mr. Sidebotham? A. Yes, sir.

Q. And were married there by some Mexican official? A. Yes.

Q. And you had some witnesses, Mr. and Mrs. A. L. Cloud, was it? A. Yes, sir.

Q. And then you returned to Los Angeles?

A. Yes.

Q. And you continued to live in Los Angeles with Mr. Sidebotham for how long?

A. Well, we were there until '35.

Q. You were there in '35. I believe you said this morning that you were happily married to Mr. Sidebotham? A. Sure, we were. [52]

Q. Is that true that in 1930 you were happily married to him?

A. Well, we had little fights but they didn't amount to much.

Q. I see. And that is true from 1930 to 1935, that you were happily married to him?

A. Yes.

(Testimony of Helene Marceau Sidebotham.)

Q. I will show you what purports to be a complaint for separate maintenance, in the Superior Court of the State of California in and for the County of Los Angeles, Madeline Sidebotham, Plaintiff, vs. Robert Sidebotham, Defendant, and I will ask you if that is a correct copy of your signature at the bottom of the last page?

A. Yes. Yes, that is my signature, yes. That is my signature.

Mr. Trowbridge: I would like to read this to the Court.

(Reading.)

I won't read the prayer. And it is signed Manuel Ruiz, Jr. You were her attorney at that time?

Mr. Ruiz: That's right.

Mr. Trowbridge: And the agreement attached to the complaint reads as follows (reading)——

Q. By the way, you also used the name of Madeline, do you? A. Yes.

Mr. Trowbridge (Reading from agreement): I ask that that be introduced into evidence as Defendant's exhibit next in order.

The Court: Let it be admitted and marked. [53]

The Clerk: Defendant's Exhibit C.

(Whereupon, agreement for separate maintenance was received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Trowbridge): By the way, you remember this action now, do you, for separate maintenance? A. Yes, I do.

(Testimony of Helene Marceau Sidebotham.)

Q. Whatever became of it? Did it ever go to judgment? Was it dismissed, or what happened to it?

A. Well, we just forgot about it.

Q. I will show you a letter dated March 3, 1932, which seems to be signed Mrs. R. R. Sidebotham, and I will ask you to please look at that and tell me if that is in your handwriting and signed by you?

A. That is my writing all right; I forgot about it. That is mine.

Q. Is that the envelope the letter was sent in?

A. Yes, sir.

Mr. Trowbridge: All right. Thank you. I would like to read in evidence a letter dated March 3, 1932, addressed, "Dear Mrs. Sidebotham," and in order to make it intelligible I will read the address on the envelope. "Mrs. R. R. Sidebotham, care Mrs. Harry C. Thayer, Haverford, Philadelphia." May I ask you who that Mrs. R. R. Sidebotham is?

A. It was Mr. Sidebotham's signature. [54]

Q. It is his first wife, isn't it?

A. Oh, I beg your pardon. That is his first wife.

Q. It wasn't his sister?

A. Mrs. Thayer is his sister.

Mr. Trowbridge: That's right.

(Reading letter, ending "Mrs. R. R. Sidebotham, 3122 Durango Avenue, Los Angeles, California.)

Q. Was that your address at that time?

A. At that time, yes.

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: I ask to have the letter and the envelope introduced in evidence.

The Court: Let them be admitted and marked next in order.

The Clerk: Defendant's Exhibit D.

Mr. Trowbridge: The envelope has a cancellation stamp on it, "Los Angeles, Cal., March"—I can't tell whether it is the 6th or the 3rd, but anyway, it is March, 1932.

Q. Did you ever get any answer to that letter?

A. No.

Q. When you and Mr. Sidebotham lived together in Los Angeles, what was his occupation?

A. He had various occupations. He was selling stocks and bonds, real estate.

Q. And did you have any occupation of any kind?

A. Sometimes I helped with him driving cars. I used to take [55] people to tracts and I used to help him driving cars.

Q. When you say "tracts," you mean real estate tracts? A. Real estate, yes.

Q. And did you help in his office?

A. Sometimes, but he didn't want me in his office much.

Q. What did you do in his office?

A. Well, I answered the phone sometimes and he sent me on some banks sometimes, some errands like that.

Q. Did he have more than one office in Los Angeles? A. Yes, he had quite a few.

(Testimony of Helene Marceau Sidebotham.)

Q. Can you tell us where they were?

A. He had one on Spring Street; he had one on Alexander Rouillette Building, Hope Street; he had one on Financial Center Building and he had one on Eighth Street.

Q. During what years did he have these offices?

A. It must have been around '32.

Q. How long did you and he stay in Los Angeles? Until what year? A. Until '35.

Q. 1935. Then where did you go?

A. Then we came to San Francisco.

Q. And where did you live in San Francisco?

A. First we lived at the Hansa Hotel.

Q. How do you spell that?

A. H-a-n-s-e. [56]

Q. Hansa Hotel in San Francisco?

A. Yes.

Q. And then where did you live?

A. Then we moved to—it was 1935 I lived there and he went up north. He said he had some business up north. Then he got in trouble. He came back in 1938 and he told me to find another place, that he was in trouble and he had to go to jail and for me to find a place, and then I moved on Union Street.

Q. Actually, after you and he came to San Francisco you and he did not live together very long, did you? A. Well, he was gone all the time.

Q. Wasn't he gone in Stockton a great deal of the time? A. I didn't know that.

Q. Didn't you—do you know it now?

A. Somebody told me now.

(Testimony of Helene Marceau Sidebotham.)

Q. Didn't you know at the time that he had a home in Stockton? A. No, I didn't.

Q. The last time that you said you saw him was in 1941; is that correct? A. That is correct.

Q. Before the divorce that is the last time you saw him. And did you get any letters from him?

A. You mean in San Francisco? [57]

Q. Yes. A. I had letters, yes.

Q. And where are they?

A. I don't know where they are.

Q. You didn't keep them?

A. I left the suitcase full of things; they might have been in there.

Q. Was he supporting you between 1941 and 1946? A. No.

Q. Did you know that he had a home in San Francisco during that time?

A. No, I didn't know it.

Q. Now, in San Francisco, how did you support yourself after 1941?

A. I worked for a real estate company.

Q. Real estate? A. Real estate company.

Q. What was the name?

A. Dempsey Real Estate Company.

Q. When did that start? A. What?

Q. When did you start to work for the Dempsey Real Estate Company?

A. Oh, I started the work when I came back from Los Angeles because we had lived in this apartment there. [58]

Q. That would be about 1935? A. Yes, sir.

(Testimony of Helene Marceau Sidebotham.)

Q. That you started to work for the Dempsey Real Estate Company?

A. Yes, temporary work.

Q. And you worked for them off and on, did you not, until 1946? A. That's it.

Q. And their office is on Sutter Street here in San Francisco? A. Sutter Street, yes, sir.

Q. Then you went to Nevada and you got a divorce in Nevada? A. Yes.

Q. When you returned, what did you do?

A. When I returned I continued to work—yes, to work a little bit for the same company.

Q. Dempsey Real Estate Company?

A. Yes; I worked in hospitals, too.

Q. And did you work for the Dempsey Real Estate Company down to the time when Mr. Sidebotham died?

A. No, not when he died at the time, no.

Q. How long did you work for them?

A. Until nineteen forty—the end of '46.

Q. You were in San Francisco when Mr. Sidebotham died? A. Yes, sir. [59]

Q. And had been here ever since 1946?

A. Well, I have been East; I went East and I stayed quite a ways away; I stayed two years away.

Q. When did you come back to San Francisco?

Mr. Ruiz: Just a moment; I believe that any inquiry subsequent to the death of Mr. Sidebotham——

Mr. Trowbridge: No; you misunderstand me. I am only going down to the date of his death.

(Testimony of Helene Marceau Sidebotham.)

Mr. Ruiz: I haven't made any inquiry so far as this case is concerned subsequent to 1946, and it is immaterial.

Mr. Trowbridge: I think it is very important, your Honor, on the subject of laches to show where she was and what she was doing up to the time she filed the complaint.

The Court: The objection will be overruled.

Q. (By Mr. Trowbridge): You came back from the East about what year, Mrs. Sidebotham?

A. 1948.

Q. And came back to San Francisco?

A. Yes.

Q. And then you lived here from 1948 until the time Mr. Sidebotham died, did you?

A. No, I went back East, and I lived in Canada for six months.

Q. Where were you when he died?

A. I was in San Francisco. [60]

Q. How long had you been here before his death?

A. Oh, I was here maybe about two or three years; I don't know for sure.

Q. About two or three years. How did you learn about his death? A. In a newspaper.

Q. San Francisco newspaper?

A. San Francisco newspaper.

Q. Did you know about his dealing in real estate; that he had—well, you told about his selling lots in real estate tracts?

A. That was kind of a line of business.

(Testimony of Helene Marceau Sidebotham.)

Q. And did you know whether he bought a piece of property in Crescent City?

A. Yes, I know that he did.

Q. What did he tell you about that?

A. That was when we were in Los Angeles.

Q. What did he tell you about that?

A. Well, he said—this is about the time when we got married in Mexico. He said he was going to buy some property in Crescent City, a tract of land, and sell properties anyway, and buy a home and settle down.

Q. He told you on more than one occasion that he was broke, did he not?

A. He told me he was broke all the time. [61]

Q. All the time he told you he was broke, and you believed that, did you? A. I did.

Q. Did you know that in 1950 he bought a piece of real estate in San Francisco for about $33,000 and that he recorded the deed and that the deed was in his name? A. I didn't know it.

Q. And it was recorded in the Recorder's Office in San Francisco? A. I didn't know that.

Q. At that time you were working for the Dempsey Real Estate Company on Sutter Street, were you not? A. 1950, you mean?

Q. Yes.

A. No; I didn't work for him after '47.

Q. Oh. But you were in San Francisco then?

A. Yes.

Q. You gave a deposition in Los Angeles on February 18th of this year, did you not?

(Testimony of Helene Marceau Sidebotham.)

A. Yes, sir.

Q. And at that time I will ask you if the following questions and answers were given——

Mr. Trowbridge: Have you the deposition?

Mr. Ruiz: Yes.

Mr. Trowbridge: Page 7, line 6. [62]

"Q. Where do you reside?

"A. El Descanso, Baja California, Mexico.

"The Notary: El Descanso?

"The Witness: E-l D-e-s-c-a-n-s-o.

"Q. (By Mr. Rogers): Is El Descanso a town?

"A. It's a ranch.

"Q. A ranch? A. Yes.

"Q. How far from Tijuana is that ranch?

"A. Oh, it's about 25 miles."

Q. Is that the testimony you gave in answer to those questions on February 18, 1955?

A. Yes, sir.

Q. Isn't it a fact that you never were——

Mr. Ruiz: Counsel, will you please show the testimony that you read from so that she could read all the testimony and that you might refer to all the testimony on that subject here?

Mr. Trowbridge: I think it is all there.

Mr. Ruiz: It is not.

Mr. Trowbridge: Well, you can amplify it. That is all I want to ask her.

Mr. Ruiz: Well, please let the witness read from here on, when you read anything like that, and have her read all the testimony on the subject. I think that is the proper procedure.

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: That is all. [63]

Mr. Ruiz: Now, counsel, she very obviously states that she was down there for her health, she was down there temporarily.

The Witness: I was down there one month.

Q. (By Mr. Trowbridge): Isn't it a fact that you were never in El Descanso or never in Mexico except in Tijuana when you were married?

A. I was there about a year ago for my health for one month and I came right back.

Q. Where were you then?

A. El Descanso.

Q. What hotel were you living at?

A. It is a ranch.

Q. It is a ranch? A. Near Tijuana.

Q. Who is the owner of the ranch?

A. Pardon?

Q. Who is the owner of the ranch?

A. The owner of the ranch is Mr. Ruiz.

Q. How do you spell the name?

A. R-u-i-z.

Q. You mean your attorney, Manuel Ruiz, Jr.?

A. Yes.

The Court: Do I understand that you have a ranch in Mexico 28 miles from Tijuana? [64]

Mr. Ruiz: Yes, your Honor.

The Court: How many acres?

Mr. Ruiz: About 48,000 acres.

The Court: What are you doing here?

Mr. Monell: That is a fair question.

The Court: Do you cultivate an acre of it?

(Testimony of Helene Marceau Sidebotham.)

Mr. Ruiz: Yes, I have wheat, I have barley, I have beans—mostly dry farming. Then I have some tenants that have some cattle and some sheep.

The Court: That is a security measure you are engaged in?

Mr. Ruiz: Yes, indeed.

The Witness: It is very beautiful.

Mr. Trowbridge: I will show you a complaint in an action in the First Judicial District Court of the State of Nevada in and for the County of Ormsby, Madeline Sidebotham, Plaintiff, vs. Robert Russell Sidebotham, Defendant. This is a photostatic copy, and on the second page appears your signature, and I ask you if that is a correct copy of your signature? A. It is.

Mr. Trowbridge: I will ask that this be admitted in evidence as Defendant's Exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit E admitted and filed in [65] evidence.

(Whereupon, photostatic copy of complaint was received and marked Defendant's Exhibit E.)

Mr. Trowbridge: I desire to read to the Court at this time from the complaint paragraph IV on the first page, and the whole of the paragraph reads as follows:

"That there is no community property to the plaintiff and defendant hereto belonging."

(Testimony of Helene Marceau Sidebotham.)

The Court: I don't get the full import of that. Read it again.

Mr. Trowbridge: "IV. That there is no community property to the plaintiff and defendant hereto belonging."

Mr. Ruiz: Do you have a transcript of the evidence in that case, counsel?

Mr. Trowbridge: I think not.

Q. Did you ever hear of Mr. Sidebotham getting a divorce in the state of Wyoming?

A. I never did before.

Q. You never heard of it? A. I do now.

Q. On November 2nd, 1940, or at any time—you never heard of his getting a divorce in Wyoming at any time; is that correct?

A. Not before, no. [66]

Q. What?

A. I know now but I didn't know at that time; he didn't tell me.

Q. Until now you had never heard of it, is that it?

A. Oh, I heard about it since Mr. Ruiz told me.

Q. When did he first tell you about that?

A. When he was informed, when you told him.

Q. When did he first tell you about it?

A. Well, it is when I went down to his office and he heard about you—he heard it some place.

Q. Let's see; he has been your attorney since about 1931 or '32 and this happened in November 2nd, 1940. Did he tell you about it in 1940 or in 1941, or when did he tell you about it?

(Testimony of Helene Marceau Sidebotham.)

A. Well, he told me in 1951 when he died—after he died Mr. Ruiz informed me.

Mr. Trowbridge: I will offer in evidence now, your Honor, a certified copy of the petition for divorce in the state of Wyoming, county of Albany, in the district court of the Second Judicial District, entitled, Robert R. Sidebotham, Plaintiff vs. Madeline M. Sidebotham, Defendant, and it is all together under one heading. The petition, affidavit for publication of notice, summons, affidavit of publication of summons, affidavit of publication of notice of taking deposition and deposition of Louise Moran, and the decree. I ask [67] that it be admitted in evidence as exhibit next in order.

The Court: Let them be admitted and marked.

The Clerk: Defendant's Exhibit F admitted and filed in evidence.

The Court: Pardon me; what is the date of that petition?

Mr. Trowbridge: The petition is dated the 6th of August, 1940, and the decree is dated November 2nd, 1940, six years before the Nevada divorce.

I think it is near the 3:00 o'clock recess time.

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Trowbridge): Mrs. Sidebotham, you saw Mr. Sidebotham once after you had obtained your divorce in Nevada, did you not?

A. Yes, sir.

Q. And when and where was that?

(Testimony of Helene Marceau Sidebotham.)

A. In 1947.

Q. And where? A. On the street.

Q. And how was he dressed at the time?

A. He was well dressed.

Q. Did you tell him that you needed money?

A. Well, I asked him if he could pay me that $100 back, and he said he was broke. So he took me to lunch and he couldn't pay it. [68]

Q. Did he tell you where he was living then?

A. No.

Q. Did you ask him?

A. He said he was going up north, he was traveling, and he had been East and he is going to go on a——

Q. Did you ask him where he was living?

A. I don't remember if I did.

Mr. Trowbridge: We have stipulated now, I believe, that this translation of the marriage certificate that I hold is a correct translation.

Mr. Ruiz: Yes.

Mr. Trowbridge: And I will ask that that be introduced in evidence. It is an English translation of the marriage certificate.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit G admitted and filed in evidence.

(Whereupon, translation of marriage certificate was received in evidence and marked Defendant's Exhibit G.)

Mr. Trowbridge: This is a copy of the certified

(Testimony of Helene Marceau Sidebotham.)

copy of the marriage certificate, and I would like to read from it for a moment.

After the introduction by the judge, it continues:

"And immediately went on proceeding to drawing [69] up of this record whereby it appears that the personal data are as follows: Robert Russell Sidebotham, 40 years old, divorced, dealer, Protestant, a native of Colorado, son of Robert A. Sidebotham and Elizabeth Sidebotham; Helen Delaire Marceau, 22 years old, single, secretary, native of Lyon, Francaise."

Q. Do you know where Lyon is in France? Were you born in France in a town called Lyon?

A. I know the name but I never been there.

Q. You have never been there and you weren't born in Lyon, France?

A. No, sir; he put that himself.

Mr. Trowbridge: In order to save time, may we introduce the deposition of this witness, of Mrs. Sidebotham, in evidence? The original is here, is it not?

Mr. Ruiz: No, I don't think that it is proper to introduce any deposition in evidence.

Mr. Trowbridge: Very well. That is all for the time being, your Honor. Co-counsel might have some questions.

(Testimony of Helene Marceau Sidebotham.)

Cross-Examination

By Mr. Monell:

Q. Mrs. Sidebotham, you stated that you lived at the Hansa Hotel in San Francisco?

A. Yes, sir.

Q. That was in 1941. Is that when you moved to the Hansa [70] Hotel? A. Not '41; 1935.

Q. 1935. I think you testified that you were at the Hansa Hotel the last time you saw him; isn't that it?

A. I saw him many times, of course, but last time I saw him in 1941.

Q. 1941. That was at the Hansa Hotel?

A. No, that was on Union Street.

Q. When did you live in the Hansa Hotel?

A. 1935.

Q. And up until what time? A. '39.

Q. Do you remember who the owners of the hotel were when you were there? Who ran the place? A. Yes, I do.

Q. Who were they?

A. Mr. and Mrs. Pratt.

Q. You testified on your direct examination that the last time you saw him was in 1941 on Union Street. That was at No. 380 Union Street, correct?

A. Correct.

Q. And you didn't know where he stayed after that? A. No.

Q. And at that time where were you living?

A. 380 Union. [71]

(Testimony of Helene Marceau Sidebotham.)

Q. And where were you in 1941?

A. 380 Union.

Q. Same place? A. Yes.

Q. Was it 318 Union or 380? A. 380.

Q. 381. And I understood you to say at one time on your direct examination that you were at the De Anza Hotel; I understood you to say that was the Hanse?

A. Hanse. Yes, I had made a mistake myself, H-a-n-s-e.

Q. In San Francisco? A. Yes.

Q. There is a hotel in San Jose, the De Anza; I thought you were referring to that. A. No.

Q. You have never lived in San Jose?

A. No.

Q. Now, you mentioned that you were happily married between 1930 up until 1935, I think you said. Do you know a Mr. Lapsey? A. Yes.

Q. Were you ever married to him?

A. No, sir.

Q. Were you ever living with him down in Arrowhead? A. No, sir. [72]

Q. Did you have a place at Lake Arrowhead?

A. Well, we had a little cabin there.

Q. Who is we, you and Mr. Sidebotham?

A. Mr. Sidebotham, yes.

Q. Do you recall when that was?

A. What?

Q. Do you recall when that was, what year?

A. It was when we came here, '28 or '29, I guess; yes, '28 up to '35 we used to go up there.

(Testimony of Helene Marceau Sidebotham.)

Q. You used to go up there from here, is that it?

A. From Los Angeles.

Q. Did you live in Los Angeles at that time?

A. Yes.

Q. That was before you moved up to San Francisco? A. Yes.

Q. Did that property belong to you or did it belong to Mr. Sidebotham or both of you?

A. No; it was a rented place.

Q. Did you stay there alone?

A. Well, sometimes. He used to go down for his business in Los Angeles; he would come over.

Q. Who was Mr. Claude Lapsey?

A. He was a neighbor.

Q. Did he have a place next door?

A. Yes, with his niece and nephew. He was an old man, he [73] was crippled.

Q. And that was—— A. 28 by two.

Q. ——December, 1931, would you say the latter part, around Christmas time?

A. We started going up there in '28 or '29 right after we got married, and we went up there all the time.

Q. Would you say you were there on or about the 21st of December, 1931?

A. I wouldn't know exactly the date, but we were there quite often.

Q. A little before Christmas of that year?

A. I guess; we were going there all the time.

Q. Were you there on or about the latter part of April, 1932? A. We had a place there.

(Testimony of Helene Marceau Sidebotham.)

Q. Pardon? A. We had a place there.

Q. You had that place at that time and you used to go up there occasionally?

A. Well, I don't know exactly what date we rented the place.

Mr. Monell: I see. All right; thank you, very much.

Redirect Examination

By Mr. Ruiz:

Q. Mrs. Sidebotham, you said you were happily married to your husband. Why did you sue him for separate maintenance? [74]

A. Well, I didn't want to lose him; I just loved him, I guess.

Q. You stated that he mistreated you and that he humiliated you? A. Yes, he did, but——

Q. And that he embarrassed you?

A. Yes, sir.

Q. Did you continue to love him?

A. Well, I must have been crazy, but I loved him just the same.

Q. Was he the first man that you ever had?

A. Yes.

Q. Later on, as far as this particular tiff in court was concerned, you became reconciled?

A. Yes, we did at that time.

Q. You continued to live together?

A. Yes, at that time.

Q. Pardon? A. Yes.

Q. Now, you said something about Lyon,

(Testimony of Helene Marceau Sidebotham.)

France; you said he put it himself. What did you mean by that—in that marriage application?

A. Well, I didn't see the papers since lately. He said—he did everything and he did that because he wanted to make me a movie star. He said he was going to put me in the movies. [75] He wanted to put me in the movies; he had a test made out of me here in Burlingame, I gues; I don't know.

Q. When you met him in New York he brought you to Hollywood, didn't he?

A. Well, first, we went to Boston.

Q. When you came out here you ended up in Hollywood, didn't you? A. Pardon.

Q. When you came west—— A. Yes?

Q. ——you went to Hollywood to live?

A. Yes.

Q. Why did he take you there?

A. He wanted to make a moving picture out of me.

Q. He wanted to make a star out of you; that is what he told you?

A. Yes; he had my picture in the paper, too; said I was from France.

Q. And that was his idea? A. Yes.

Q. When you saw him in 1947 you say you met him on the street? A. Yes.

Q. You said he was well dressed?

A. Yes. [76]

Q. How did he dress?

A. Oh, he dressed very neatly, and he had a brown suit.

(Testimony of Helene Marceau Sidebotham.)

Q. I mean when you were living together, when he was with you, how did he dress?

A. Oh, he dressed well—very well.

Q. Did he always dress well?

A. Well, yes. Oh, yes, he was very particular.

Q. Was this true even though he was broke?

A. Well, he managed to get dressed anyhow; he gets up early in the morning and was very particular.

Mr. Ruiz: I would like to offer into evidence a transcript of the proceedings in the case of Madeline Sidebotham vs. Robert Russell Sidebotham in the First Judicial District of the State of Nevada, as well as the final judgment of divorce as entered in that particular case. I would like to read the transcript of proceedings into evidence.

The Court: Let them be admitted and marked.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Whereupon, transcript of proceedings was received into evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Ruiz: The transcript of proceedings as Plaintiff's Exhibit 3 and the judgment as Plaintiff's Exhibit 4.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in [77] evidence.

(Whereupon, the judgment referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Helene Marceau Sidebotham.)

(Mr. Ruiz thereupon read Plaintiff's Exhibits 3 and 4 to the Court.)

Mr. Ruiz: That is all to indicate there was no question of property that was gone into as alleged in the pleadings.

Q. Now, Mrs. Sidebotham, calling your attention to a date that says June 30, 1931, that appears in this transcript, did you testify June 30th, 1931, or some other date?

Mr. Monell: I will object on the ground that that is an improper attempt to impeach a record.

Mr. Trowbridge: I will join in the objection.

The Court: Is there an exception to the rule? He challenges the record. I will allow it subject to a motion to strike, and overrule the objection, so that you may have a record.

Q. (By Mr. Ruiz): What did you testify?

A. I said June, 1941.

Q. Very well.

A. Because he was coming over to my house.

Q. That is all right. Did you ever discuss, when you were running errands for your husband, any of his business affairs with him? [78]

A. No, I didn't discuss it.

Mr. Ruiz: No further questions.

(Testimony of Helene Marceau Sidebotham.)

Recross-Examination

By Mr. Trowbridge:

Just a moment, please.

Q. Mrs. Sidebotham, I will show you Defendant's Exhibit E in evidence here and I ask you if that is your signature on the second page and if you swore to that? A. That is my signature.

Q. All right. I will read the complaint, paragraph V, photostatic copy of the complaint signed and sworn to by Madeline Sidebotham:

"V. Plaintiff brings this action to secure a judgment for a decree of divorce from the defendant and as cause therefor alleges that for more than three consecutive years just prior to the filing of the complaint in this action, to wit: Since on or about June 30, 1931, at Los Angeles, California, the plaintiff and defendant lived separate and apart from each other without cohabitation; that said separation still continues."

Were you living in Los Angeles, California, on June 30, 1931? A. Yes, sir—'31.

Mr. Trowbridge: That is all.

Mr. Ruiz: No further questions.

The Court: Step down. [79]

Mr. Ruiz: Just a minute now.

(Testimony of Helene Marceau Sidebotham.)

Redirect Examination

By Mr. Ruiz:

Q. By the way, when you went to this office in Nevada, whom did you first meet?

A. First, I met the two girls at the office.

Q. You met the two girls in the office?

A. Yes.

Q. Did you see this lawyer, Frame, there?

A. No, sir.

Q. Did you talk to him? A. Yes, sir.

Q. At that time? A. Yes, I did.

Q. Now, you say you met the two girls. You met him, also?

A. Oh, no; not him; no; he wasn't there.

Q. And what did you do at that time?

A. Well, she asked me a few questions and I answered my name, and she asked me where—if I knew where he was. I said I didn't know.

Q. And then what else?

A. And then talked about the price, and she said for me to come back again.

Q. Did you thereafter come back a second time?

A. Yes, sir; I did.

Q. At that time did you talk to the lawyer? [80]

A. No, I didn't do that, because he was a sick man; he wasn't there.

Q. When is the first time you talked to the lawyer, if you talked to him?

A. Pardon me; it is about two days before we went to Carson City.

(Testimony of Helene Marceau Sidebotham.)

Q. Is that where the divorce was granted?

A. Yes, because I have the receipt here put in the back, "You better come for appointment for a couple of days." I have the receipt.

Q. All right. Then where did you go?

A. We went to Carson City.

Q. Did you see the lawyer then? A. Yes.

Q. Where was he, in Carson City?

A. Well, I saw him in court.

Q. You saw him in the courtroom?

A. Oh, no; I saw him in his office a couple of days before we went to Carson City.

Q. You saw him in his office?

A. Yes, I did.

Q. Did you have a conversation with him?

A. Well, some; not much.

Q. What conversation do you remember having with him?

A. Well, he asked me—I couldn't understa i him very well, [81] he was paralyzed and I couldn't understand so well his language.

Q. You couldn't understand so well his language

A. No; he was kind of an old, sick man.

Q. Is that the first time you saw him, just two days before you went to court?

A. Yes, that is the first time—the last time before I went to court. I saw him in court.

Q. The second time is when you saw him in court? A. Yes, sir.

Q. And when you got to court, did he qu tion

(Testimony of Helene Marceau Sidebotham.)

you? A. Oh, yes; he questioned me.

Q. Now, I believe you stated that you came up here to San Francisco in what year?

A. 1935.

Q. 1935. How did you happen to go to the Hansa Hotel?

A. Well, my husband came here on business, and he said, "You stay there; I will come back for you." He had business up north.

Q. He usually travelled around; is that it?

A. Yes, all the time.

Q. And there he paid the rent; is that correct?

A. At the Hansa, I don't know if I paid or he paid. I paid. I know I paid.

Q. Where did you get the money? [82]

A. He give me the money for the rent.

Q. I see. And then later on you went and lived at the Union Street address? A. Yes.

Q. Did he come over there and visit you?

A. Yes.

Q. And did he have relations with you there?

A. I have some up at the landlady upstairs.

Q. No, no. Did he have personal relations with you as husband and wife?

A. Well, he stayed at home sometimes.

Q. Did he do the same thing over at the Hansa Hotel?

A. Oh, yes, he had some clothes and stayed there. He had to go on business up north.

Q. The question is, did he cohabit with you as husband and wife? A. Yes.

(Testimony of Helene Marceau Sidebotham.)

Q. Now, you said you didn't know that he had gotten a divorce in Wyoming in August, 1940. Where were you living in August, 1940?

A. On Union Street; 380 Union.

Q. Did he know your residence there?

A. Sure.

Mr. Ruiz: This divorce, if the Court please, is on substituted service that has been introduced here as [83] Defendant's Exhibit F. It is predicated on an affidavit to the effect that the plaintiff does not know the whereabouts of Mrs. Sidebotham, on the fact that her residence is unknown, and it has a decree that says as follows:

"And it appearing to the Court that due and regular service has been made and had on the defendant by publication, and proof of which publication is filed herein; and it appearing further from the affidavit of the plaintiff that he has exercised due diligence and inquiries as to the whereabouts of the defendant; that her residence is unknown and cannot be with reasonable diligence ascertained; and the defendant being in default for want of an answer or other appearance herein, and the plaintiff being in court personally with his attorney and the deposition of the witness having been presented and the plaintiff having testified in support of the allegations of his petition——"

whereupon a decree of divorce was granted to him upon those representations which are jurisdictional.

You may recross.

Mr. Trowbridge: No questions.

(Testimony of Helene Marceau Sidebotham.)

Recross-Examination

By Mr. Monell:

Q. Mrs. Sidebotham, where did you say you [84] were living in 1941? A. 380 Union Street.

Q. You testified a few minutes ago on your cross-examination that you lived at the Hansa Hotel from 1935 to 1938, and then you moved to the Union Street address? A. Correct.

Q. How long did you live there?

A. On Union Street?

Q. Yes. A. I lived here until 1942.

Q. Up until 1942? A. Yes.

Q. You have testified that you did not see your husband since 1947; that was the last time you saw him? A. Yes.

Q. And you hadn't seen him prior to that excepting in 1941? A. That's it.

Q. Where did you see him in 1941?

A. At Union Street, 380 Union.

Q. And what was he doing at that time?

A. Wait a minute, 380 Union—I don't remember if it was 1941, really, if I saw him; I know I lived at Union Street. Yes, that's it; I saw him in 1941, yes.

Q. Did he call upon you at that time?

A. Yes, he called on me and he told me to wait for him. [85]

Q. Did he stay at your place then that night?

A. Yes, and he brought me a machine, a sewing

(Testimony of Helene Marceau Sidebotham.)

machine, and he said, "You make some clothes; when I come back we go to South America."

Q. When was that in 1941? A. In 1941.

Q. When? A. Summer time.

Q. When? What part of the summer time?

A. Well, I know it was summer time, but I can't recall the date.

Q. What was he doing at that time?

A. Well, he was selling bonds or stocks, a salesman, trying, he said, to make money.

Q. What company was he working for?

A. He didn't tell me.

Q. How long did he stay in town on that trip?

A. Well, that day he stayed all day. He stayed all day that day.

Q. Weren't you working at that time?

A. No, I work only temporary, you know, to show some property some time. I open up property. They had some place for sale, and then they call me up. I was cleaning up the place and showing it.

Q. Did you take the day off when he came up to see you? [86] A. Yes.

Q. Is that all you took off, that one day?

A. I guess so, yes.

Q. When was the time you had seen him before that?

A. I would see him occasionally. He knew where I lived. He come in and he goes.

Q. When did you see him before the summer of 1941?

(Testimony of Helene Marceau Sidebotham.)

A. Well, he knew where I was when I moved from the Hansa in nineteen thirty——

Q. I'm not asking that. I am asking you what you knew now, Mrs. Sidebotham. When did you see him before the summer of 1941?

A. I see him three or four months before that, in 1940. He know where I was.

Q. When did you see him in 1940?

A. At the Union Street. That is where I was living.

Q. Was he working for the same company all this time?

A. I don't know if he was working for a company; he was working for himself.

Q. What money did he send you during that time, if any?

A. Well, he didn't send me much.

Q. How much?

A. One time he sent me $10 and he paid the rent.

Q. Did he pay the rent all along at the Union Street place?

A. Most of the time. If I was not there he would go himself. [87]

Q. How often would he send you money, $10 or so?

A. Oh, I can't remember that. He will give it to me when he came.

Q. How frequently? Did you get a hundred dollars a year? A. Oh, no.

Q. Or a thousand dollars a year?

(Testimony of Helene Marceau Sidebotham.)

A. I say no.

Q. How much?

A. Just pay the rent, $19 a month, and he said he was broke, he was trying to make a living.

Q. Did he always take you out to dinner when he came in town? A. Oh, yes, he did that.

Q. Where did he take you to dinner on this occasion in 1947, the last time you saw him?

A. Well, that time he was coming at the Hansa.

Q. In 1947?

A. No, he was coming right at Grant Avenue and Bush Street, that's it.

Q. That is where the Hansa is, between Grant and Bush? A. Yes.

Q. Grant and Kearny, isn't it? A. Yes.

Q. Was he staying at the Hansa Hotel, or were you? A. No. [88]

Q. Where were you living in 1947?

A. In 1947 I was living on Franklin Street.

Q. Were you living alone at that time?

A. Yes.

Q. And where did you have dinner or lunch when he took you out in 1947, the last time you saw him? A. Pardon?

Q. Where did he take you?

A. Oh, he took me at the corner there, that little place—you know that little place there on the corner.

Q. You mean that little sandwich store up there? A. Yes.

Q. Which corner?

(Testimony of Helene Marceau Sidebotham.)

A. Near the Astoria Hotel. That is small place there; I don't know the name of that place.

Q. How long did you stay there for lunch, do you recall? A. Oh, just a short time.

Q. Did you tell him then that you had divorced him? A. Yes, I did.

Q. What did he say to that?

A. Well, he said, "I didn't know," and "It's too bad." He said, "I wish you good luck." And he said, "I don't think I was any too good," and all that.

Q. Didn't he tell you he had divorced you himself in Wyoming?

A. No, he didn't say a word about that. [89]

Mr. Monell: I think that is all.

Mr. Ruiz: That is all.

The Court: We will take a recess until 10 o'clock tomorrow morning. [89-A]

Tuesday, October 25, 1955

The Clerk: Sidebotham vs. Katz, further trial.

HELENE MARCEAU SIDEBOTHAM

the plaintiff herein, resumed the stand and testified further as follows:

Further Redirect Examination

By Mr. Ruiz:

Q. Who is Lois Umbsen?

A. She is Mr. Sidebotham's sister.

(Testimony of Helene Marceau Sidebotham.)

Q. While you were married to Mr. Sidebotham did you ever receive any communications, telegraphic or correspondence, from her?

A. Yes, I did.

Q. Did you ever receive any communication from her when you were living at the Hansa Hotel in San Francisco? A. Yes, I did.

Q. I will show you an envelope marked Ardmore, Pennsylvania, dated February 15th—rather, postmarked February 15, 7 p.m. 1939, addressed to Mrs. Madeline Sidebotham, 447 Bush Street, San Francisco, California, and ask you if you recognize that envelope? A. Yes, I do.

Q. And that was sent to you by her?

A. Yes.

Mr. Ruiz: I would like to offer this into evidence at [90] this time as Plaintiff's next exhibit in order.

The Clerk: Plaintiff's Exhibit 5 admitted and filed into evidence.

(Whereupon envelope referred to above was received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Monell: Just the envelope—that is all you are introducing?

Mr. Ruiz: That is all I am introducing at this time.

Q. Yesterday you testified that you sued your husband in a suit for separation and you related in your complaint that he treated you cruelly. When did he do that?

(Testimony of Helene Marceau Sidebotham.)

A. Only when he was introxicated.

Q. Only when he was intoxicated?

A. Yes.

Q. After you became reconciled, did he drink like he did before? A. No, he didn't.

Mr. Ruiz: You may cross-examine as to the last two questions.

Mr. Monell: No questions. [91]

DANIEL J. BYRNE

a witness called on behalf of the plaintiff; sworn.

The Clerk: State your full name, your occupation and your address to the Court.

A. Daniel J. Byrne, manager of the safe deposit vaults, Savings Union Branch, American Trust Company.

Direct Examination

By Mr. Ruiz:

Q. Are you here in response to a subpoena, sir?

A. Yes, sir.

Q. And did you bring some records with you?

A. Yes, sir. (Producing documents.)

Q. Now, those records to which reference is made, are they records of your banking institution?

A. Well, the first two—the first one is not. That is from a bank that used to be at 26 O'Farrell Street.

Q. With respect to the bank at 26 O'Farrell Street, did you purchase that or merge with it?

A. We purchased that on September 8th, '44.

(Testimony of Daniel J. Byrne.)

Q. And in connection with the purchase did you take over assets? A. Yes.

Q. And safety deposit boxes and other things that belonged to the former institution?

A. Yes, sir. [92]

Q. And that is one of the official records of the institution that you purchased?

A. Yes, sir.

Q. Now, referring to the first record, that is dated January 9th, 1943, and makes reference to a safety deposit box No. 1861 for an annual rental of $3.00.

Mr. Trowbridge: Just a moment, please. We are going to object to any reference to that document on the ground that it is hearsay, and not the best evidence, there is not proper foundation laid for it. They should produce an officer of that particular bank if they want to introduce it. This gentleman—he has shown that he doesn't know anything about it and it was not a part of the records of his bank, incompetent, irrelevant and immaterial.

Mr. Monell: We will join in the objection, if the Court please.

The Court: For the purpose of the record, the objection will be sustained.

Q. (By Mr. Ruiz): Now let's get back to the Security Safe Deposit Company. Pardon me. What did you say your occupation was?

A. Manager of the safe deposit vaults.

Q. You are manager of the safe deposit vaults?

A. Of the American Trust Company.

(Testimony of Daniel J. Byrne.)

Q. Does that vault contain a box which is numbered 1861? [93] A. Yes; it does now, yes.

Q. And as manager of the safety deposit section are those boxes under your supervision?

A. Yes, sir.

Q. And do those boxes have records with respect to persons that have rented them?

A. Yes, sir.

Q. And are those records under your control?

A. Yes, sir.

Q. And are they records made by your banking institution and its predecessor in privity and interest in the course of regular banking business?

A. Yes.

Q. And is this one of those records that you have? A. Yes, sir.

Q. And are you able to identify it as a record that you have under your supervision and your control? A. Yes, sir.

Q. All right. Now, I notice that this particular record or this particular Security safe deposit box bears a date January 9, 1943.

Mr. Trowbridge: Just a moment. I renew the objection. He is reading from the same document which I objected to and to which your Honor has sustained an objection, and I object to any further reference to that or any question about it. [94]

Mr. Ruiz: Well, I added the additional foundation that you took objection to, sir.

Mr. Trowbridge: Well, I still maintain, your Honor, that this is a record of a bank that is out

(Testimony of Daniel J. Byrne.)

of business, that this gentleman was not connected with, and unless he can show that he was an employee of that bank at the time that these records were made and they were under his control in 1943—and I don't think this gentleman can so testify——

Mr. Ruiz: All we need to show is that this gentleman is a manager of a particular department and that that department has records, no matter how far back they go as long as there was direct privity with respect to the keeping of records of that particular safety deposit area.

Mr. Trowbridge: It is an entirely different box and a different bank, your Honor.

Mr. Monell: We join in the objection, if the Court please.

Mr. Trowbridge: I will add that it is immaterial, irrelevant and incompetent.

Mr. Ruiz: I think a proper foundation has been laid.

Mr. Trowbridge: May we ask the witness a question, your Honor?

The Court: Certainly.

Q. (By Mr. Trowbridge): Mr. Byrne, you are an employee of the American Trust Company? [95]

A. Yes, sir.

Q. Manager of the safe deposit department. How long have you been such? I mean how long have you been an employee of that bank.

A. Forty-three years.

(Testimony of Daniel J. Byrne.)

Q. Were you ever in any way connected with the Security Safe Deposit Company?

A. No, sir.

Q. And where was that bank located?

A. No. 26 O'Farrell.

Q. Was it in the same building your bank is located? A. No, a little alley between it.

Q. Was it a different institution? A. Yes.

Q. Independent from American Trust?

A. Yes.

The Court: Until they took them over?

A. Before that.

Q. (By Mr. Trowbridge): There is a safe deposit box there numbered 1861 of the Security Safe Deposit Company. Do you as an employee of the American Trust Company have any such safe deposit box No. 1861? A. Yes, we have.

Q. No, I mean corresponding to that box.

A. Well, it all depends upon the numbers of those cards [96] there, how they run down; there have been changes. I don't carry in mind what those changes are, but they plainly show when it is rented, when surrendered, when the changes were made and for what reason it was done.

Q. I show you this paper again and ask you to look at the ink insertions where the blanks are filled out in ink; is that your handwriting?

A. No, that is Mr. Jones', the gentleman that managed that at that time.

Q. In other words, those are in the handwriting of an employee of the Security Safe Deposit Com-

(Testimony of Daniel J. Byrne.)

pany and not of an employee of the American Trust Company? A. Yes.

Mr. Trowbridge: I think, your Honor, that we have showed that there is no foundation there.

The Court: In what respect hasn't the foundation been laid?

Mr. Trowbridge: Because it is a separate bank, a separate independent bank; no employee of the American Trust Company has filled out any of the blanks on this form. It is purely hearsay, entries by third persons in another bank, and I don't see how that can possibly be admissible.

The Court: Pass it up. Now indicate for the purpose of the record the purpose of this offer.

Mr. Ruiz: For the purpose of showing that the party [97] identified there under the name of Towner who opened the safe deposit box is tied with the decedent in this action to show that it was an alias adopted by the decedent and that the property therein contained belonged to him.

The Court: I will allow it subject to a motion to strike and overrule your objection. Unless it is connected up it will go out.

Mr. Ruiz: At this time I would like to offer this contract dated January 9th, 1943, in evidence.

The Witness: Can I supply a photostatic copy instead of the original?

The Court: He wants to know if he can supply a photostatic copy instead of the original.

Mr. Ruiz: I have no objection.

Mr. Monell: We have no objection.

(Testimony of Daniel J. Byrne.)

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

(Safe deposit record admitted and received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Monell: What is the name of the predecessor of the company?

Mr. Ruiz: Security Safe Deposit Company.

Q. Now, I notice in your testimony you stated that these various instruments are chained up in some way. Can you refer to the four instruments I am handing you and ask if after this [98] box in January, 1943, was opened whether there was another card with respect to the same box issued by the bank.

A. Well, this particular card was issued by the people that owned the building and they took it away from those people.

Q. Now you are referring to a blue card?

A. Yes; that is still at 26 O'Farrell.

Mr. Trowbridge: We object to this on the same grounds, no proper foundation laid, hearsay, not a business record maintained by the American Trust or by this gentleman.

The Witness: We used that card.

Mr. Trowbridge: Just a moment, please. And that it is irrelevant, immaterial and incompetent.

The Court: I will allow it subject to the same ruling. Overrule the objection.

Mr. Monell: We join in that objection.

The Court: Let the record so show.

(Testimony of Daniel J. Byrne.)

Q. (By Mr. Ruiz): Your attention is called to the fact that this is dated 4/24/44 and that it refers to safe No. 1861 and is called "Individual lease agreement, access by lessee only, W. H. Towner." Can you state from the amount of the rental and your experience as manager of those vaults whether the vault or box was the same size or whether it was larger?

A. No, both the same size; both the same box.

Q. Both the same size and both the identical box? A. The same box. [99]

Mr. Ruiz: I would like to offer the photostatic copy of the instrument to which reference I have made in lieu of the original.

The Court: Let it be admitted as next in order.

Mr. Ruiz: By stipulation, if I may.

Mr. Trowbridge: Yes, subject to the same objection, except we won't object to the photostatic copy.

Mr. Monell: We join in the stipulation.

The Court: Are you supplying photostatic copies now?

Mr. Ruiz: Yes.

Mr. Monell: You mentioned a blue card. Is there some other identification?

Mr. Ruiz: Yes. The blue card will be the one which is being offered at this instant by the plaintiff.

Mr. Monell: It is labeled "Individual Lease Agreement" and dated May 22, 1945. Would that be the one you are referring to?

(Testimony of Daniel J. Byrne.)

A. May 24th——

Mr. Monell: That is April.

The Witness: That is the date it was surrendered.

The Court: That is the date of surrender?

A. The latter date is the date of surrender.

Q. (By Mr. Ruiz): April 24, 1944.

A. There is two cards in that picture.

Mr. Monell: This is called "Individual Lease Agreement" [100] and the top part is the back of the card and the bottom part is the front; is that it?

The Witness: Yes.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in evidence.

(Photostatic copy of blue card labeled "Individual Lease Agreement" admitted and received in evidence and marked Plaintiff's Exhibit 7.)

Q. (By Mr. Ruiz): Now, I notice that you have now three of the remaining cards in your hand. Can you refer to the card that followed the card of April 24, 1944, please?

A. That was surrendered on May the 21st, '45. Was it May 21st, '45? That is correct.

Q. Is it your testimony that Plaintiff's Exhibit 7 was surrendered on May 21st, 1945?

A. Yes.

Q. By the person who signed as W. H. Towner?

A. That is correct.

(Testimony of Daniel J. Byrne.)

Q. Was there another safe deposit box then opened?

A. Yes, a larger box, 2173, for $6.00.

Q. A larger box was then opened by the person who signed himself as W. H. Towner?

A. That is correct.

Q. And when was that taken?

A. That was taken the 21st of May, 1945. On the 22nd of [101] May it was surrendered because it wasn't large enough. He took a larger box, $8.00.

Mr. Trowbridge: What institution are you referring to? A. Our own card.

Q. What bank?

A. American Trust, inasmuch as the American Trust used that green card for a year or so before we changed, we used their card.

Q. (By Mr. Ruiz): The card to which reference was just made was the card issued by your employer? A. Yes.

Q. And that was opened on what date?

A. I think it was May 21st, wasn't it?

Q. And you say that was surrendered——

A. On the 22nd and taken this box.

Q. Of May, 1945?

A. That is correct; he took an $8.00 box.

Q. Mother's maiden name says "Frances Russell" on this card. A. Yes.

Q. I would like to offer that as Plaintiff's next exhibit in order and in lieu, pursuant to the stipulation, substitute a photostatic copy.

Mr. Trowbridge: May I see it? I would like to

(Testimony of Daniel J. Byrne.)

get the sequence of this right. This box was surrendered on May 22, 1945. Is there a card that shows when this one was opened in [102] the American Trust?

A. Yes, right there on the 21st, on the reverse side. The renting is on one side and the surrender, cancellation, is on the other side, reverse side. That is his handwriting there.

Mr. Trowbridge: Thank you very much.

Q. (By Mr. Ruiz): I notice you said that is his handwriting. Where is the handwriting of the applicant on this card?

A. I am pretty sure he put the date down and the address, his name, and "San Francisco"——

The Court: Raise your voice so the reporter can hear you.

Q. (By Mr. Ruiz): In other words, the renter signs in his own handwriting, is that correct? He did on that card? A. Yes.

Q. He did on this card?

A. Most of the time they do unless the address has been changed.

Mr. Ruiz: I would like to offer as Plaintiff's next exhibit in order the last document referred to by the witness.

Mr. Monell: Is this the one that was cancelled?

Mr. Ruiz: Yes.

Mr. Monell: 2173?

Mr. Ruiz: Dated May 22, 1945.

Mr. Monell: That was Box A-2173?

Mr. Ruiz: Safe No. A-2173.

(Testimony of Daniel J. Byrne.)

The Clerk: Plaintiff's Exhibit 8 admitted and filed in [103] evidence.

(Card re Safe No. A-2173 admitted and received in evidence and marked Plaintiff's Exhibit 8.)

Q. (By Mr. Ruiz): Calling your attention to Plaintiff's Exhibit 6, being the original contract dated January 9, 1943, on the reverse side thereof it gives an address, 220 Golden Gate Avenue, and it says "Notify Lois Umsen." Can you tell me, if you know, who put that name of the sister down there, Umsen?

A. Well, I am pretty sure that is Mr. Jones' handwriting.

Q. Mrs. Jones?

A. Mr. Jones. Both he and she were then Mr. Jones.

Q. Who is Mr. Jones?

A. He was the man that ran that vault; it used to belong to the Brotherhood Bank.

Q. Are you acquainted with Mr. Jones' signature?

Mr. Trowbridge: Just a moment, please.

A. Yes, that's right.

Mr. Trowbridge: Just a moment. Will it be understood we have the same objection to this testimony that we made to the other testimony?

The Court: A running objection.

Mr. Trowbridge: It is a running objection, your Honor, subject to a motion to strike?

(Testimony of Daniel J. Byrne.)

The Court: Right.

Q. (By Mr. Ruiz): Are you acquainted with Mr. Jones' signature? [104] A. Yes.

Q. And his handwriting?

A. I wouldn't say too much of his handwriting.

Q. You have seen his signature before?

A. Yes.

Q. And that is his signature? A. Yes.

Mr. Ruiz: Mr. Clerk, I should have given you the photostatic copy in lieu of the original and I will do that at the present time.

Q. (By Mr. Ruiz): I notice that you have two more cards in your possession. Which is the next card in order as to date? A. This one here.

Q. The card you are now handing me?

A. That's right.

Q. And that refers to safety deposit box No. A-1917? A. That's right.

Q. And the renter was a W. H. Towner?

A. That is correct.

Q. Insofar as his signature is concerned?

A. That is correct, yes, sir.

Mr. Trowbridge: What bank?

Mr. Ruiz: Savings Union office, San Francisco, California; is that correct? [105]

A. Yes, that is correct.

Q. Is that the bank? A. Yes.

Mr. Trowbridge: That is part of the American Trust Company? A. American Trust.

Q. (By Mr. Ruiz): And it says "Introduced

(Testimony of Daniel J. Byrne.)

by A-1861 and A-2173." What does that mean, if you know?

A. Well, we carry those on as references.

Q. And what do those references indicate, if anything?

A. They at one previous time have had that box.

Q. I see. A. That box renter.

Q. And can you tell when this was surrendered, this box?

A. Yes, that was surrendered on February 10, 1947.

Mr. Ruiz: I would like to offer as Plaintiff's next exhibit in order the document just referred to.

Mr. Trowbridge: Let me see it.

Mr. Ruiz: And in lieu of the original substitute by stipulation of counsel a photostatic copy thereof.

(Photostatic copy of card re Safe No. A-1917 admitted and received in evidence and marked Plaintiff's Exhibit 9.)

Q. (By Mr. Ruiz): Did you personally ever see Mr. Towner?

A. Yes, quite often. I waited on him quite a bit.

Q. You knew what he looked like? [106]

A. Yes, sir.

Q. I think you have one more card left, sir.

A. Yes, sir.

Q. I notice that this card bears a date, Savings Union office, February 10, 1947, and it says "Introduced by A-161, A 2173 and A-1917." And likewise is signed by the renter under the signature

(Testimony of Daniel J. Byrne.)

"W. H. Towner." A. That is correct.

Q. And up here on top it says "W. H. Towner, deceased." Can you tell me who put the word "deceased" on there? A. I did.

Q. You did? Who told you that he had died, if you remember?

A. If I am not mistaken, it was a party that said his name was Sidebotham.

Q. Somebody by the name of Sidebotham?

A. A young man who said his name was Sidebotham, looking out for his father's possessions. He had quite a few keys. I couldn't find that name in my place. I couldn't find any of the keys that he had present. We had quite a little talk there about what different banks he may go to. Then all of a sudden he pulled out some photographs. As soon as I saw the photograph I showed it to the lady and I said, "That is so-and-so, isn't it?" I couldn't call the name at the time that she did and I said, "That's it." Then he did pull out a key out of his pocket that belonged to that box and the identification was made. [107]

Q. Did he say that was his father's photograph?

A. Yes.

Q. He said the photograph was his father—that is, Mr. Sidebotham—did he? A. Yes.

Q. And this photograph was the same man that had been signing under the name of Towner?

A. That is correct.

Q. And the one that you had always been seeing there? A. Yes.

(Testimony of Daniel J. Byrne.)

Q. You have been there how many years?

A. I am on my forty-third.

Q. And when that was located Mr. Katz came over here—you see that gentleman over there—and he took over everything that was in it, didn't he?

A. That is correct. It was examined by the Inheritance Tax man, Mr. Kane, who is with the state, a very fine fellow.

Q. And that is the signature of Mr. Katz?

A. That is, yes. I witnessed that.

Mr. Ruiz: I would like to offer this document as the next exhibit in order.

Mr. Monell: Is that the same box you referred to, A-1917, or the new——

Mr. Ruiz: 2917.

The Court: It will be admitted and [108] marked.

The Witness: That is the new one.

Mr. Ruiz: Apparently he kept getting larger boxes.

The Witness: That is the new one. He went to that one on account of a lost key. It was the same size as the last one—they are two of the same size, but he transferred from one to the other on account of the lost key.

Q. Do you remember he had more than $63,000 in cash in that box?

A. I heard it, but I didn't count it. I heard it.

Mr. Monell: I ask that the answer go out as being hearsay.

The Court: It may go out. What he heard may

(Testimony of Daniel J. Byrne.)

go out. I take it Katz counted the money; I don't know.

The Witness: A couple of times.

Mr. Ruiz: I think that is why he has this big brief case here.

The next exhibit in order is being offered by the plaintiff at this time.

(Photostatic copy of card re Safe No. A-2917 received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Ruiz: You may cross-examine.

Cross-Examination

By Mr. Monell:

Q. Mr. Byrne, you have no personal knowledge of any of the transactions of your predecessors, that is, the Savings Bank and the Brotherhood Bank, so far as this box is concerned, isn't that true? [109]

A. Just as we took these records over.

Q. Do the records which you have show how many times the decedent had access to this box?

A. At our place?

Q. No, so far as the predecessors are concerned.

A. No, we had a record, a couple of boxes of those access tickets, but we didn't keep them.

Q. Do your present records show, since the American Trust Company took over the prior institution, how many times the decedent went to that box? A. Yes, sir.

Q. And have you those records with you?

(Testimony of Daniel J. Byrne.)

A. No, I haven't.

Q. Do you know by any chance of your own knowledge how many times he had access to that box?

A. Oh, just guessing, I would say fifty or sixty times.

Q. Over what period of time?

A. The time that he has been with us since '44 until the time he passed away. I had a list—I made a list of them.

Q. To whom did you furnish that list?

A. It was given to several different people. Several different times I made that list.

Q. And you wouldn't know, nor would that list disclose, whether he put anything in the box at those times or whether he withdraw from the box at those times? [110] A. No, it would not.

Q. As to any contents of the box at the time it was opened after Mr. Sidebotham's death, you wouldn't know how long those particular contents had been there, would you?

A. No, I have no idea.

Q. You mentioned that this last box was opened because he lost the key to box 1917, I believe; is that correct? A. Yes.

Q. What is there on that card that indicates that to you? A. That the key was lost?

Q. Yes.

A. At that time we put this little sticker on, "Key lost," and the date it was reported.

Q. Oh, I see. Does that sticker show on the label? A. Yes, it is on the photostatic copy.

(Testimony of Daniel J. Byrne.)

Q. I overlooked that.

A. And a clip is also put on the box.

Q. When a key is lost, then what happens to the old box?

A. It is surrendered by him, he takes a new box, and that lock is changed before it is rerented again.

Q. Is that a considerable operation that takes some time?

A. Oh, yes, yes; the safe company does it for us. We don't do our own changing; that is done by the safe company. We don't know what the change is.

Q. The only reason you don't change the particular lock and [111] give him a new key is on account of——

A. Sometimes they have found the other key and come down with it and couldn't get in and we have a lot of trouble.

Mr. Monell: I think that is all, Mr. Byrne. Mr. Trowbridge may have some questions.

Q. I wonder, Mr. Byrne, could you supply us with that list of the dates? Do you have that at your bank? A. Yes, I have.

Q. I don't like to ask you to come back; we would like to have it.

A. I will mail it to you if you wish. It might take a couple of hours to make it.

Q. You don't have any extra supply of copies?

A. I have the original, and from the original I make copies.

(Testimony of Daniel J. Byrne.)

Q. Is it as long as that? You say it will take two hours?

A. It is a batch. I have got each contract and each access for each box.

Q. I think you are slandering your secretaries down there to say that it would take two hours to copy a list of a couple of pages.

Mr. Monell: Will we be proceeding a couple of days? If he mailed it to us here wouldn't it get here before the case concluded?

Mr. Ruiz: I don't know. I might ask him a general question at this time. [112]

Q. You made up these lists before?

A. Yes.

Q. Taking the arbitrary date, November, 1946, were more visits made before or after?

A. Oh, I wouldn't be able to remember that; I would have to get that statement.

Mr. Monell: Possibly we could arrange, if you would have that done.

The Court: Maybe counsel has got a copy. Have you got a copy?

Mr. Ruiz: No, your Honor. I have never been furnished with that list.

Mr. Monell: Mr. Fontes doesn't have a copy either, your Honor. I was going to suggest that if you will have that typed on the bank stationery we could pick it up at the close of the session this afternoon.

The Witness: I will have it ready by half past

(Testimony of Daniel J. Byrne.)

four this afternoon. I could bring it to your office if you want.

Mr. Monell: If you could do that.

The Witness: Where is your office?

Mr. Ruiz: Counsel, will you request him to make a duplicate copy?

Mr. Monell: And will you make a duplicate copy so Mr. Ruiz could have one and send it to 1019 Mills Building?

The Witness: Yes. [113]

Mr. Monell: Thank you, very much.

The Court: Is that all from this witness?

Mr. Ruiz: That is all from this witness.

The Court: You might relax now.

Mr. Monell: Thank you.

Mr. Ruiz: Thank you, sir. [113-A]

FRANK J. FONTES

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name, your occupation and your address.

A. Frank Fontes. I am an attorney. The address is 360 Phelan Building. I also have an office in the City Hall. I am attorney for the Public Administrator.

The Court: Who is the Public Administrator?

A. W. A. Robison.

Q. Where is he?

A. He is up at the office now, I believe, unless he is out on safe deposits.

(Testimony of Frank J. Fontes.)

Q. Does he depend on you to take care of this?

A. Well, I handled this long before he came into the office. This came into the office in about '51 or '52 and he hasn't been there that long.

Q. What is his name? A. W. A. Robison.

The Court: I'm afraid I'm getting old. I used to know everybody at the City Hall.

A. He was connected with Hetch Hetchy for a while and then the San Francisco Water Department.

The Court: Well, he knows me, then. They all know me.

Direct Examination

By Mr. Ruiz:

Q. You have the estate of Robert [114] Sidebotham under your supervision and control?

A. Yes, sir.

Q. In your capacity as Public Administrator?

A. Well, I am attorney for the Public Administrator. It has been under the control of the Public Administrator, first with Phil C. Katz, and then I was in there for a short time while they were holding examinations, and then Mr. Robison is now the Public Administrator and he has the estate under his control.

Q. He has delegated you authority particularly to take care of this estate?

A. Yes; I have been taking care of it from its inception.

Q. For and on behalf of the Public Administrator? A. Correct.

(Testimony of Frank J. Fontes.)

Q. Now, one of the authorities of your office is to collect and take charge of decedents' estates?

A. Correct; yes, sir.

Q. And you then file an inventory pursuant to your duties? A. Yes.

Q. Is the County Clerk here with the file?

A. No, Mr. Powers was here yesterday; I don't see him here today.

Mr. Ruiz: I asked him to come down here this morning. Now we need the file.

The Court: He was here all day yesterday. Why didn't [115] you call him?

Mr. Ruiz: I told him to come here this morning, sir. I will have to telephone him.

The Court: We will take a recess.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Ruiz): Now, pursuant to your authority to collect and take charge of the decedent's estate, you did in fact file an inventory?

A. Yes.

Mr. Ruiz: I have showed a photostatic copy of an inventory that I gave to counsel, and I would like to show the witness a photostatic copy of an inventory and ask you if that is the inventory which appears in the original files, sir.

A. Yes. I can't recall item by item, but I have looked at it and this appears to me to be a copy. I see these appraisers there and I recognize——

Q. The signature?

(Testimony of Frank J. Fontes.)

A. Yes. That appears to me to be an inventory —the inventory we filed, yes.

Q. And what was the estate appraised at insofar as the total is concerned?

A. Well, you mean this—in this jurisdiction, this figure shown here, $113,219.74. [116]

Q. Do I understand that proceedings were had in other jurisdictions as well? A. Oh, yes.

Q. Does the local file indicate the appraisal as to those assets?

A. Well, I have the copy of the federal return, your Honor, which shows sort of a collective list of assets purporting to be here and in Idaho and in Colorado.

Q. Fine. Now, with respect to the particular item that I am still making reference to and which is in your hand—— A. Yes.

Q. May I have it, please? A. Yes.

Q. I notice that in the heading it says, "In the matter of the Estate of Robert Russell Sidebotham," and that there are other names there: "Also known as Robert R. Sidebotham, Robert Sidebotham, R. R. Sidebotham, Russell Sidebotham, R. Russell Sidebotham, Edward W. Sidebotham, George W. Anderson, George William Brown, George W. Fenton, E. W. Hutton, Edward Hutton, Edward W. Hutton, W. H. Jackson, R. R. Smith, Russell R. Smith, George William Smith, Russell Robert Smith, George R. Stone, George W. Thompson, W. H. Towner, and William Towner,

(Testimony of Frank J. Fontes.)

Deceased." Can you state why those names appear on the caption?

A. It was reported to us that the decedent was also known [117] under other names. Names were furnished to us by other persons; I think possibly from one of his sons; an attorney representing Mrs. Ramsey, and also from one of the administrators over in Idaho or Colorado, I am not sure.

Q. And did you in fact accumulate assets in that inventory and appraisal under those various names?

A. Yes, some of them. I can't positively take each name and say, for example, Towner is one of the names he used on that safe deposit box.

Q. He had other bank accounts, didn't he?

A. Yes.

Q. And your records indicate where you received funds from such other banking institutions?

A. Yes, they would. The ledgers would show that. I see them listed here on the inventory giving the names of the banks. I recognize some of these accounts.

Q. Will you refer to the accounts and state what you recognize about the accounts concerning the inventory?

A. First, that currency was from a safe deposit box in the American Trust Company.

Q. And how much was the currency?

A. $64,770.

Q. Yes; continue.

A. Some of this apparently is part of the contents of the safe deposit box of the Eureka Federal

(Testimony of Frank J. Fontes.)

We took charge of [118] that one down here. Of course, obviously, we took charge of all of these various monies that are shown in this inventory, that's for sure.

Q. Under what name did he have an account in the Eureka Federal?

A. I can't tell you from memory. I would have to take each bank and refer right to our records, or in some instances the ledger don't show the name, just shows what bank we got it from, and possibly the number of it, and also whether it is a savings or commercial account.

Q. Where is that ledger that you make reference to?

A. That is in our office in the City Hall.

Q. And that ledger will indicate from what institution it came?

A. Well, I can't from memory say. Generally speaking, there is some notation on the ledger as to where that item came from. But I might have to, in turn, refer to the ledger—to a journal for the item.

Q. Will you bring the ledger and the journal this afternoon, sir? A. All right.

Mr. Ruiz: At this time I would like, in lieu of the inventory and appraisal which is on file, offer as Plaintiff's exhibit next in order, a photographic copy thereof, stipulated to by the adverse [119] counsel.

Mr. Monell: Is that certified by us?

(Testimony of Frank J. Fontes.)

The Witness: There's the file stamp on the back of that.

Mr. Ruiz: Yes, it is certified by the County Clerk of the City and County of San Francisco and it has the seal of the Clerk's office.

Mr. Monell: We will stipulate to the introduction of the photostatic copy.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 11 admitted and filed.

(Whereupon, copy of inventory and appraisal was received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Ruiz): Has it ever been determined that the ownership of the properties inventoried by your office belonged to any person other than the decedent?

A. It has not finally been determined; there is an action pending to determine, a claim filed.

Q. The question is, has it ever been so determined? A. The answer is no.

Q. Mr. Fontes, has your office ever marshalled any evidence pursuant to its duties which proves where the decedent procured the funds and the monies which go to make up his estate?

A. No, no, we don't usually establish proof of ownership. If we find monies on deposit in the name of a deceased [120] person and we are handling the estate, we take charge of that account.

(Testimony of Frank J. Fontes.)

If there are other claimants asserting any title to it, then they either bring suit against us or file some sort of a claim.

Q. Have you ever been able to determine when the funds and the monies which go to make up the decedent's estate first came into existence?

A. No, no, that is part of the matter that is being tried in another action now as to the source of his present or the monies that he owned at death. And I refer to the decedent.

Q. Have you any evidence to prove that monies and funds of the decedent inventoried by you were not earned by decedent before the month of November, 1946?

A. Your question is, have I any proof as to whether they were earned prior to a certain date?

Q. Yes.

A. I have no proof as to when they were earned.

Q. Now, isn't it a fact that the decedent left no books of account of any kind?

A. No, no books of decedent—books of account of the decedent ever came into our possession.

Q. Now, you mentioned something about the Internal Revenue Department a little while ago.

A. Yes.

Q. Have you inquired whether the United States Internal [121] Revenue Department has accumulated any evidence concerning the period of time as to when the decedent earned or received the monies which you inventoried?

A. They filed a lien against the estate for over

(Testimony of Frank J. Fontes.)

$149,000 in which they list income starting with 1946 and running through 1951, and then they take the tax on what they call a net worth basis and they have added penalties and they have added interest on top of that, and the total of all those figures for all that period is over $149,000.

Q. Is there in the file, the original file, a copy of that lien? A. Yes.

Q. Which indicates what you have just stated?

A. Right.

Mr. Ruiz: Mr. Powers, do you have the files?

Mr. Powers: Yes.

Mr. Ruiz: May it be stipulated, counsel, that these files are the official files of the estate of Robert Sidebotham, Deceased?

Mr. Trowbridge: Correct.

Q. I am handing you the official file, sir, and with respect to the last question will you refer to the Internal Revenue——

A. Yes, this first paper that I came to, your Honor, marked "Claim of the United States for taxes" appears to [122] be the one, yes.

Q. Now, let me make reference to that document to which reference you have made. That was filed February 27, 1953, was it not? A. Yes, sir.

Q. Now, is there located in that file a comparative statement of certain assets concerning income and tax liability that was ever called to your attention?

Mr. Trowbridge: What document are you referring to, counsel?

(Testimony of Frank J. Fontes.)

Mr. Ruiz: I will have to go a little bit further along this and then we will get to that.

Q. Now, on February 11, 1953, in that file, will you please observe what you filed on that date? Is it not a fact that on February 11, 1953, you petitioned for instructions to incur expenditures for the specific purpose of investigating when Mr. Sidebotham earned or received monies?

A. We did file petitions on more than one occasion, I believe.

Q. Now, will you look in the file for the date February 11, 1953? A. February 11, '53?

Q. Yes, sir.

A. I have one February 13, 1953, for instructions.

Q. To employ William Dolge & Company, certified public [123] accountants, to make an investigation?

A. I don't know; I came to a notice here. We did file a petition to employ William Dolge—I can answer your question without looking at that date; we did file such a petition and secured such an order.

Q. The reason I am making reference to the petition is because you make a statement there, and I want to read it into evidence, February 11th, 1953.

A. The dates don't seem to be in order. I have come to the 13th.

Q. That is one of them. Let me see if I can find it.

(Testimony of Frank J. Fontes.)

The Witness: This begins in '53.

Mr. Ruiz: Here we are. I have found it.

The Court: I was going to suggest maybe the clerk is more familiar with these documents than you are. He might possibly help you.

Mr. Ruiz: I think we have found it here, February 11, 1953.

A. Yes.

The Court: The lost is found.

Q. (By Mr. Ruiz): Is that the petition where you asked the Court for instructions to employ William Dolge & Company, certified public accountants, to make an investigation?

A. Let's see; the name of the person here particularly——

Mr. Ruiz: Let's see if there is some other document— [124] here it is; February 11th. That's it.

Q. Isn't it a fact that on February 11, 1953, you filed a document wherein you say the following—that is your signature, isn't it?

A. Yes, it is; yes.

Q. And it contains the signature of Mr. Delger Trowbridge as well? A. Yes.

Q. "The Internal Revenue Bureau refuses to disclose any of the facts in its possession as to how and on what evidence it based its jeopardy assessment. Said decedent left no books of account of any kind but did leave bank accounts, cash and other assets in various banks of the state of California and elsewhere and left a mass of miscellaneous documents in Idaho, which material has been de-

(Testimony of Frank J. Fontes.)

livered to Delger Trowbridge, your petitioner's special counsel." A. Yes.

Q. Is it not a fact that the Internal Revenue Department has refused to give you information concerning the time—— A. Is what?

Q. Is it not a fact that the Internal Revenue Department has refused to give you information as to the time when the decedent acquired these monies?

A. Well, only what I assumed from the tax lien, and I [125] assume from the tax lien that that levy of that lien by the calendar years of '46 to '51 means what it says: That during those particular years that is what he made.

Mr. Monell: Just a moment. If the Court please, for the purpose of the record, I would like the answer of the witness insofar as it is his assumption of that being the amount that the decedent made go out as being the conclusion of the witness.

The Court: I think maybe we can agree on that.

Mr. Ruiz: Very well. It should go out anyway.

Q. Now, on the question of the time when the monies which went to make up the assets of the decedent were accumulated, did William Dolge & Company, certified public accountants, render a report to you? A. Yes.

Q. Do you have that report with you?

A. I had a copy.

Q. May I see the copy?

A. I think I delivered that to Mr. Trowbridge.

Mr. Trowbridge: Yes, I have it here, and it is

(Testimony of Frank J. Fontes.)

addressed to me. I think it is a privileged communication that counsel is not entitled to.

Mr. Ruiz: Aren't you attorney for the Administrator?

Mr. Trowbridge: I certainly am; I am representing him in this case. [126]

Mr. Ruiz: And didn't the estate pay money for that?

Mr. Trowbridge: I assume it did.

Mr. Ruiz: And was this not filed pursuant to the duties in an estate for probate filed in California by the Public Administrator?

Q. Now, isn't it a fact that when this firm of public accountants began to investigate pursuant to your petition that you asked that he investigate only the income of the decedent between the years 1946 to the time that he died?

A. I have had—I am not aware of that specific instruction. It could have been, because I think that that evidence was required largely on account of this very high levy of $149,000 which would exhaust the estate.

Mr. Ruiz: Your Honor, I am looking for a paragraph where he was asked to do that. I will find that later so as not to take too much time.

Q. William Dolge & Company was in fact paid the sum of $1,500, you said, to find out if the decedent's assets were accumulated after 1946; is that not true?

A. They were paid. I don't recall the amount. If it is set forth in the account, of course, that would

(Testimony of Frank J. Fontes.)

be correct, but I don't carry in mind the amount they were paid; but they were paid, that is true.

Q. And these licensed accountants wrote a letter to your special counsel, Mr. Delger Trowbridge, about their investigation? [127]

A. I wouldn't know what they wrote to Mr. Trowbridge personally; I know generally what was going on, but I can't be specific about that.

Q. Well, didn't you get a copy of the letter?

A. I can't recall now. There was so much correspondence went on in reference to this estate that I can't carry in mind what copies I received.

Q. Will you look for such a copy during the noon recess?

A. A copy of the letter written by Dolge to Mr. Trowbridge?

Q. That was sent to you.

A. A copy sent by them to me?

Q. Yes.

A. I will look and see. Do you know about what year you are referring to?

Q. Pursuant to the petition filed for special instructions to which reference I have been making.

A. All right.

Q. On April 2nd I believe you made reference to the fact that your office filed a report made up by the United States Treasury Department from which it appears that the decedent did not file income tax returns for the years 1946, '47, '48, '49 and '50.

(Testimony of Frank J. Fontes.)

A. They filed a tax lien, yes. Is that what you call a report? Yes, it is. [128]

Q. That the decendent didn't file any returns?

A. That is what their tax lien is based on, yes, because——

Q. Because the decedent did not file an income tax return? A. That is what the tax lien says.

Q. As administrator of the estate, have you any evidence that the decedent did file a report wherein he reported income received or earned by him for the years 1946 to the date up to and including the year 1950?

A. Not for '46 or anything after that. I think for '45 he made a report of some earnings at a shipyard or something like that.

Q. Let me see; the decedent died in 1951, didn't he? A. Yes.

Q. And the year 1951 was his last taxable year on earth?

A. Yes, he died in December of that year shortly before Christmas.

Q. He did make a report that he received in 1950, or was it '51, the sum of $10,000?

A. If he did, I don't know about it.

Q. I believe that there is in that file—I am going to call your attention to this schedule again because it was taken from the file at one time, wherein there is set forth the following information: That the decedent, according to the files, made no income or reported no income——

Mr. Trowbridge: Just a moment, please. You

(Testimony of Frank J. Fontes.)

are referring [129] to a piece of paper that we haven't seen. May we see that paper, please?

Mr. Ruiz: No, this isn't the paper. I am referring to his independent recollection, if he knows where in that file something else I will have to get out of it.

A. I do not recognize the document you held in your hand at all. I mean to say entitled a comparative statement of income over this period of years. I am not familiar with it.

Mr. Ruiz: Here is one of the letters.

The Court: Do you have that letter?

Mr. Trowbridge: What do you mean?

Mr. Ruiz: Concerning his net income. I will ask the witness:

Q. Now, I am showing you another document here where it refers to the decedent's net income with respect to reports filed by him before the Bureau of Internal Revenue, and in 1946 it says, "None filed."

Mr. Trowbridge: Just a moment. That document is not in evidence.

Mr. Ruiz: I am going to have him identify it, if I can. Up to 1950—and then in 1951——

Mr. Trowbridge: Just a moment, please, your Honor. He is reading things into the record from a paper that has not been identified or authenticated in any way.

The Court: He is trying to identify it. [130]

Mr. Trowbridge: I know, but he shouldn't be reading the whole document in evidence. That is my

(Testimony of Frank J. Fontes.)

objection. Mr. Fontes can look at it and say what he knows about it.

The Witness: I don't recognize this document at all. I don't know whether the tax lien has got this same stuff in it or not. The penalties and the tax seem the same to me because they add up the same, but that at the top here, 1946 up to and including 1950, they say, "None filed." And '51, according to this paper, they have $10,015.06. Let me see the tax lien.

Mr. Ruiz: Now, will you look through the record, and particularly where the government has filed matters.

The Court: Counsel, may I inquire, where did you get this document?

Mr. Ruiz: I think I got it out of the file.

The Court: What file?

Mr. Ruiz: One of these two files that are here, your Honor.

The Court: Proceed.

The Witness: It may be there, counsel, but I am just not familiar with it. I don't recall of seeing that data that is along the top there.

Mr. Ruiz: May I mark this for identification at this time?

The Court: It may be marked for [131] identification.

The Clerk: Plaintiff's Exhibit 12 marked for identification.

(Testimony of Frank J. Fontes.)

(Whereupon, document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Ruiz): It may appear in the document—I am not too sure, filed February 27, 1953. Do you want to look at the other? A. Yes.

Q. February 27, 1953? A. All right.

Mr. Ruiz: No, that is something else. I'm sorry.

The Court: Is it possible this might be a forgery?

A. I have a suspicion that was a return which might have been filed by us, wasn't it, after he was dead? He didn't file a return the same year he got killed in.

Mr. Ruiz: I will have to devote my noon hour to going through that file, your Honor, I can see that. I am trying to proceed as far as I can without wasting the Court's time any more.

Q. On May 13, 1953, your office filed a petition for instructions wherein the firm of Krout & Schneider had been employed to investigate the location of assets of the decedent under a series of different names and aliases, and in that petition you felt that Krout & Schneider should be paid the sum of $1,065.70, did you not? [132] A. Yes.

Q. May 13, 1953?

A. Yes, we filed a petition to employ Krout & Schneider.

Q. Now, three months later, on August 13, 1953, you likewise filed another petition wherein you

(Testimony of Frank J. Fontes.)

thought that Krout & Schneider were doing so well that you felt that they should get $500 more; is that not true?

A. If it is set forth in the petition and you are asking me if that is the record, that is correct.

Q. Well, does the record not contain such a petition which was filed?

A. I can't remember the contents of each petition, but generally speaking, we employed Krout & Schneider, and I have a recollection they did come back and ask for more money after they performed one duty or got one report in, they suggested for more money they would do something else, but I can't remember the details of it.

Q. Now, a confidential report was rendered by this firm; is that not true?

A. I believe you are correct.

Q. And this report covers the activities of the decedent before the year 1947 as well, did it not?

A. I don't—I would have to refresh my memory. I can't say what the report of these investigators contained without referring to the report itself. I could probably locate [133] that report maybe during the noon hour, unless we took time now, because the file is very voluminous and it is very difficult to familiarize myself with an entire suitcase here full of papers.

Q. That is true. Will you try to locate that confidential report, sir? A. Yes, I will.

The Court: So that your lunch is not interfered with, I am going to take an adjournment now and

(Testimony of Frank J. Fontes.)

if all of these documents are available, all of you can get together and find out where they are and what they are.

Mr. Ruiz: Thank you, sir.

The Court: If that is agreeable to everyone, we will take an adjournment until 2:00 o'clock.

(Whereupon, an adjournment was taken to 2:00 p.m. the same day.) [134]

Afternoon Session, October 25, 1955

FRANK J. FONTES

resumed the stand.

Direct Examination
(Continued)

By Mr. Ruiz:

Q. Just after the noon recess when you got down from the witness stand, you handed to Mr. Trowbridge an envelope that contained a report, did you not?

A. Yes, I gave Mr. Trowbridge the report in the Dolge matter, and I believe he had the one in the Krout & Schneider.

Q. And you had that report in your possession when I was questioning you this morning?

A. Krout & Schneider, no.

Q. The Dolge report?

A. Yes. I gave that to him today or yesterday, I have forgotten; I gave it to him, though.

(Testimony of Frank J. Fontes.)

Q. At noon? A. I am not sure about that.

Q. Do you recall having a conversation with me during the noon hour? A. Yes.

Q. And do you recall telling me that you were just giving it to Mr. Trowbridge?

A. I had given him the Dolge report. At any rate, he had gotten it. He had both reports.

Q. Very well. Calling your attention to the file again, [135] I believe we were talking about the Bureau of Internal Revenue. A. Yes.

Q. And there appears a registered letter which is made an exhibit therein of a petition for instructions filed April 21, 1953. A. Yes.

Q. Is that not so? A. Yes, sir.

Q. There is reference made to an exhibit called Exhibit A therein? A. Yes.

Q. And calling your attention to Plaintiff's Exhibit 12 for identification, I will ask you if you have compared that with Exhibit A or the portion thereof.

A. Yes, that is the same thing. First it has got the income stated——

Mr. Trowbridge: May I see it a moment?

A. Yes. This and that are the same. That is the method upon which they arrived at their income for these various years. Down here is the tax and penalties.

Mr. Ruiz: Very well. At this time I would like to offer Plaintiff's Exhibit 12 into evidence.

The Court: Let it be admitted and marked.

Mr. Trowbridge: We will object to that, your

(Testimony of Frank J. Fontes.)

Honor, as [136] being hearsay. The proper foundation isn't laid for it. It is obvious it is a copy of a report of a government agent, and it must be based on hearsay. It is obvious on the face of it.

The Court: Indicate for the purpose of the record the purpose of the offer, counsel.

Mr. Ruiz: Yes. The law is this with respect to hearsay and the purpose for which it is offered: that although a party litigant as a rule cannot be concluded or his rights affected by the acts or statements of strangers, but yet insofar as such acts or statements furnish circumstantial evidence of relevant facts or have any legal operation material to the subject of inquiry evidence thereof is admissible. Now, the courts will take judicial notice of the laws; the courts will take judicial notice of the regulations promulgated pursuant to the federal requirement that residents shall, if they receive income, make a report. That is their duty and their legal obligation.

The conduct of the decedent is likewise an admission against interest. In any admission against interest in this case to the claim asserted by the plaintiff, it becomes germane.

Now, with respect to this particular Internal Revenue report, it is admissible under the theory of law I have just stated, because we are going to have to indulge in presumptions [137] later on when we finally terminate this case and find out that there is no evidence whence, where or how he got the money. And all evidence that can come in by way

(Testimony of Frank J. Fontes.)

of circumstantial evidence is going to be important for this Court because this Court is going to have to indulge in the presumption that the decedent obeyed the law; that the decedent didn't commit a crime with respect to his income; that the decedent didn't commit fraud with respect to his income; and this becomes at once material because of the fact that it indicates that for the years '46, '47, '48 and '49, he did not make any income tax returns, which means that it allows us to indulge in the presumption he obeyed the law; that he didn't make any money. In '51 there was a return made by the administrator for $10,000 which means that, excepting the sum of $10,000, the money that he acquired must have been acquired prior to 1946. That is the purpose for which it is offered.

Mr. Trowbridge: Your Honor, counsel has done a lot of testifying in his argument here. It still remains the fact that this exhibit is attached to the notice of lien in which the government is demanding taxes of $149,000, and that in turn was an exhibit to a petition for instructions by the public administrator, the administrator of this estate, to get authority to contest this claim. That appears right in the petition for instructions. In other words, the Public [138] Administrator is not admitting that those allegations in this report are correct. They are obviously hearsay. They are simply a memorandum attached to a notice of a lien demanding taxes from the administrator of this estate, and nothing in the world to back them up. It is obvious

(Testimony of Frank J. Fontes.)

on their face that they are hearsay. Proper circumstantial evidence is always admissible, but it can't be based on hearsay. You can't build up your case with circumstantial evidence on hearsay, and that's all this is, is hearsay. Therefore we object to it on that ground, and on the ground the proper foundation has not been laid and it is immaterial, irrelevant and incompetent.

Mr. Monell: We join in the objection.

Mr. Ruiz: These are liens that have been filed by the United States Internal Revenue Department. And again I refer to Liberty Bank v. Ernst, 93 Cal. App. 560, and Liberty Bank v. Nonnemann, 96 Cal. App. 476, to the effect that these statements are relevant and admissible to the subject of this inquiry and that evidence therefore is properly received by this Court.

The Court: I am going to allow the testimony to go in subject to a motion to strike and overrule your objection, and we will have an opportunity at that time to examine the authorities that he cites as to the admissibility.

Mr. Trowbridge: Thank you. [139]

The Court: You haven't waived any of your legal rights.

Mr. Ruiz: Again I will call your attention, sir, to an item contained in the same file under your supervision which makes reference to certain monies which were located in various names and which have now become a part of the estate. I call specifically your attention to a comparative statement

(Testimony of Frank J. Fontes.)

of certain assets and refer your attention to the items therein mentioned, being items 2 to 9, and more specifically to one item that says: "Date account established, initial deposit," and then various years beginning 1945, '46, '47, '48, '49, '50 and '51.

Mr. Trowbridge: What is this attached to? That is the petition here?

Mr. Ruiz: That is some of the privileged information.

Mr. Trowbridge: All right; pardon me. We will make the same objection to this line of testimony, your Honor; that it is obviously based on hearsay and incompetent, irrelevant and immaterial and no proper foundation laid. This again is merely a petition for instructions and anyone can see that it is hearsay. It is not in the form of an affidavit as to the particular facts that show in that exhibit but was merely put in there for information by the Administrator so that he can tell the Court what claims he has to meet and what money he needs to investigate these claims. It is obviously hearsay, and we will again make that objection. [140]

Q. (By Mr. Ruiz): Now let us start with the depository Eureka Federal Savings and Loan Association.

Mr. Monell: Just a minute.

The Court: Let me try to follow you. What are you attempting to do?

Mr. Ruiz: There are nine items of accounts here, your Honor, which indicate the date each account was established in accordance with the records of

(Testimony of Frank J. Fontes.)

the public administrator. The public administrator pursuant to his duty has reduced certain assets and accounts to his possession. His possession is the possession of the decedent. As a public officer in this public file, the administrator perforce must predicate his conclusions herein on any minute data available to him.

One way to examine a witness, be he an accountant or any other expert, is to simply straightforward have him answer a question. If counsel are interested in knowing on cross-examination how he came to his conclusions, that's their privilege.

The Court: I don't follow you in your statement as to experts. What experts do you mean?

Mr. Ruiz: For example, when a party, let's say an accountant, testifies with respect to sums, I think the proper procedure is to ask him the conclusion.

The Court: We are not dealing with an expert here, are we? [141]

Mr. Ruiz: Now we are dealing with a public official.

The Court: Yes.

Mr. Ruiz: This public official has made an inventory. The inventory is in evidence. Now if the parties or anyone is interested in knowing how he reached that inventory, I think that is a proper way to examine him.

The Court: Is that the purpose you wanted?

Mr. Ruiz: Yes, your Honor.

The Court: I will limit it to that purpose.

Mr. Trowbridge: I would like to add something

(Testimony of Frank J. Fontes.)

to that. There is one statement that counsel made that does not follow, and that is that there is no duty on the administrator to tell anybody where the assets came from. All he has to do as administrator is to report to the Court what assets he came into possession of and to describe them and file a sworn inventory and have the assets appraised. He is not under any duty to anybody to say where the assets came from, and 99 times out of a hundred it would be hearsay anyway. And it isn't shown that Mr. Fontes knows of his own knowledge where these assets came from. If there is anybody in the Public Administrator's office who knows where the assets came from, let Mr. Ruiz produce them, but Mr. Fontes can't tell that.

The Court: Are you familiar with this item under discussion?

A. I can state what our records show. I compared a few of [142] the items with our ledger; I can tell that.

The Court: Very well; tell us about them.

A. All right.

Q. (By Mr. Ruiz): Do you have your ledger with you?

A. Yes, I have the ledger pages and the cash receipts book too.

Q. Fine.

A. As an illustration, the first item there is Eureka Federal Savings and Loan Association. They have got the amount at death, that is '51; that is the date they got above that column, a balance

(Testimony of Frank J. Fontes.)

of $4,155.23. We collected $4,217.56. Now the difference between what they have there and what we collected is this: We include in our collection a dividend for the first six months of '52 amounting to $62.33 and the figure that we have—it shows the total on this letter from Eureka, $4,155.23, exactly the same as they have. Now that is the Eureka.

Q. Now let me ask you a question on that, sir. Did that——

The Court: Pardon me; let him conclude and then you can question him.

A. Now the next one is Pacific National Bank, $525.79. Let's see if I can find that here. $525.79 appears on—those numbers up there are the estate numbers—that is, our number for the estate, our office number. It has that figure after the Pacific National Bank, balance of commercial account, $525.79, [143] the same as is in the Federal report.

The next one is the Bank of America, 7th and Olive, Los Angeles. They have on the Federal report $1,120.79. We have "Bank of America, 7th and Olive, balance in commercial account $1,120.79."

Anglo-California, Market and Jones, $433.24. We have Anglo-Cal. Bank, balance of savings account in the name of Edward W. Hutton $433.24.

The next one is Anglo-California—that hasn't got anything in the balance, so skip that one.

Bank of America, Arguello and Geary. They show a balance of $2,524.75. We show for the same bank the same amount.

The Bank of America, Trustee, Day and Night

(Testimony of Frank J. Fontes.)

Office. They show $1,867.00. We show the same bank, the same amount.

Merrill Lynch. That is a broker. They show from the receipt from the broker a balance in his hands, $792.10. Here it is, Merrill Lynch, balance brokerage account, $792.10. That is the last one.

Q. (By Mr. Ruiz): Very well, sir. Now going back to the same accounts. The account with the Eureka Federal Savings, out of which the estate received $4,155.23, approximately that sum——

A. Yes.

Q. The initial deposit of $4,000.00 was made——

Mr. Monell: We will object to the testimony with regard [144] to the initial deposit because it is obviously hearsay, and the best person to testify to that would be the particular depositary that received the funds. He is reading from a report either to the Administrator or to someone else, and not from any record of the corporation which had the deposit.

Q. (By Mr. Ruiz): What do your records indicate with respect to the initial deposit?

A. Well, in all fairness to the Court, I have a letter from the Eureka Federal Savings and Loan giving the opening date.

Mr. Monell: I will object to the introduction of a letter from the Eureka Savings and Loan Association as being based on hearsay and that the proper official of the Eureka Savings and Loan Association should be here to identify this account.

(Testimony of Frank J. Fontes.)

A. All I can say, we requested the information and this is what we got. Now I can't add anything to that.

The Court: This is in your records?

A. Yes, it is part of our file, your Honor.

The Court: I will allow it. The objection will be overruled.

Q. (By Mr. Ruiz): Of $4,000. With respect to the Pacific National Bank of San Francisco, out of which the estate received approximately $525.79——

A. I haven't got any information in my own files as to when that account was opened. At least I haven't seen it; I don't know; it may be here, but I couldn't find it. [145]

Q. This was a report given to Delger Trowbridge, the attorney, was it not?

A. What? I don't know which——

Q. This is part of a report.

A. I can't say. Mr. Trowbridge can enlighten you as to whether or not the Federal documents are attached to the Dolge report or not; I don't know.

Q. Again calling your attention to the document in which the same exhibit appears, you will notice it has the signature of W. A. Robison, subscribed and sworn to on the 26th day of August, 1953.

A. Yes.

Q. And that he says he is the administrator and has read the foregoing petition and knows the contents thereof.

A. Yes; it speaks for itself.

(Testimony of Frank J. Fontes.)

Q. And that is part of the files, the official Superior Court file, is that not true?

A. It is referred to as an exhibit.

Mr. Monell: May I ask how it is identified as an exhibit?

A. It says, "Your petitioner has received a statement from William Dolge and annexed hereto as Exhibit A is a copy of the letter written by Delger Trowbridge." But I don't know anything about it, whether there was a tax due or not, I don't know. [146]

Mr. Ruiz: We will find out right now. There is attached to said letter a comparative statement of assets listing eight accounts and the name of the account, it appearing that said decedent opened accounts in various names, other than Robert H. Sidebotham. Does that not appear to be a comparative account to which reference has been made?

A. Apparently the language is intended to refer to that document. That petition, your Honor, was a petition to fix the fees or the reasonable value of the services rendered by Dolge & Company. Now that is all I can tell you about it.

Q. And that petition was filed by your office?

A. Right.

Q. And pursuant to your petition the Court awarded some money? A. Right.

Q. To these people? A. Yes.

Q. So that they could present this document and make it a part of the official files?

A. Yes.

(Testimony of Frank J. Fontes.)

Q. Again I will call your attention to the Pacific National Bank of San Francisco, and it has November 21, 1946, date the account was established.

Mr. Monell: I object to that on the same grounds heretofore urged. [147]

The Court: I will allow this testimony to go in subject to a motion to strike and over your objection. It hasn't been argued. He has cited cases. I am going to keep my mind open on this matter in the interests of time in order to get a proper record here. That may or may not be admissible, I am not prepared to say.

Mr. Trowbridge: I would like to join in that objection on behalf of the defendant W. A. Robison.

The Court: Let the record so show.

Mr. Monell: For the purpose of the record may we state further that there is no statement in the petition for instructions that is filed here, whatever the petition may be named, that the matter attached to the petition is certified as being correct by the petitioner. It is merely a report of a letter addressed to Delger Trowbridge with an accompanying statement.

The Court: The answer to that is I am allowing this testimony to go in for the record.

Mr. Monell: I understand that, your Honor, but for our record we are merely stating the basis of our objection and you are letting it in subject to a motion to strike later on to be urged?

The Court: Yes.

(Testimony of Frank J. Fontes.)

Mr. Monell: Thank you very much.

Q. (By Mr. Ruiz): Said initial deposit was for the sum of [148] $400; is that not true in this record to which reference I am making?

A. The record so states; I don't know.

The Court: That is the Pacific National Bank?

Mr. Ruiz: That is the Pacific National Bank of San Francisco.

The Court: What does it disclose?

Mr. Ruiz: Under the name of Robert Sidebotham there was an account established on November 21, 1946; the initial deposit was $400.

The Court: Proceed.

Q. (By Mr. Ruiz): And in 1951 the sum of $525.79 was taken from that account, was it not, by your administration?

A. We verified all those, the balances.

Q. Very well. Item No. 4 is the Bank of America National Trust and Savings Association, 7th and Olive Streets? A. Yes.

Q. In the name of Russell Sidebotham, Trustee. The account was established February 24, 1947; the initial deposit——

Mr. Monell: If the Court please, I would like to add the further objection that that was apparently after the divorce was entered between the parties.

Mr. Ruiz: But we don't know whether it came before or afterwards.

Mr. Monell: You certainly have to show the rights of [149] these people and the administrator of the estate.

(Testimony of Frank J. Fontes.)

Mr. Ruiz: We are going to be able to argue that as a matter of law, your Honor.

Mr. Trowbridge: Then let me make clear that this account and the previous account were both opened after the divorce, your Honor, so what rights would the plaintiff have as to an account opened after the divorce?

The Court: In order to have a record I will allow it subject to a motion as I have indicated.

Mr. Monell: May we have a running objection to the entire line?

The Court: Let the record so show.

Mr. Trowbridge: On behalf of both parties.

Mr. Ruiz: I will so stipulate.

Q. The initial deposit was $800 on that date, according to this report?

A. According to that record, yes.

Q. And the administrator in 1951 received $1,120.79? A. Yes.

Q. Item No. 5 is the Anglo-California National Bank, Market-Jones office, San Francisco, in the name of Edward W. Hutton, Savings Account No. 12513. The date the account was established was February 7, 1946, according to this record?

A. Yes.

Q. And the initial deposit was $610? [150]

A. According to that record, yes.

Q. And the estate received from that account $433.24 in 1951, according to this record?

A. Yes, we received that.

Q. Item No. 6 is the same bank, the Market and

(Testimony of Frank J. Fontes.)

Jones office? A. Yes.

Q. Under the name of Edward W. Hutton, Trustee. That account was opened on August 31st, 1946, according to this record? A. Yes.

Q. With an initial deposit of $867.27?

A. That is what that record says.

Q. And in 1951 there was nothing taken out of this account? A. Nothing.

Q. The same bank, the same party, on December 4, 1941, there was an initial deposit of $300?

A. Yes.

Q. And that——

A. The record shows that, at least—I mean that report.

Q. And that account was closed on August 31, 1946? A. Yes, that is what the report states.

Q. Item No. 7, Bank of America National Trust and Savings Association, Arguello and Geary office.

A. Yes.

Q. Under the name of Russell R. Sidebotham? [151] A. Yes.

Q. That account indicates it was opened on May 14, 1947, for $500?

A. That is what that report states.

Q. And the estate received $2,524.75 in 1951?

A. Yes, we did receive that.

Q. Bank of America, Day and Night office, San Francisco, under the name of Russell Sidebotham, Trustee. This indicates that account was opened June 5, 1943.

(Testimony of Frank J. Fontes.)

A. Yes, it states that in the report.

Q. For the sum of $1,203.14? A. Yes.

Q. And that the estate received $1,867.00 on that account? A. Yes, we received it.

Q. Merrill, Lynch, Pierce, Fenner and Beane, San Francisco, under the name of Edward W. Hutton. The date that that account was established was February 8, 1946?

A. That is what that report says.

Q. And the initial deposit was $1500?

A. Correct.

Q. And the estate received $792.10 from that?

A. That's what we received.

Q. Very well. You inventoried certain real estate owned by the decedent, did you not?

A. Yes. [152]

Q. And that is set forth in the inventory, being Plaintiff's Exhibit 11? A. Exhibit 11?

Q. Yes, sir (handing document to witness).

A. Oh, the inventory, yes—the property out on Geary, you mean?

Q. Do any of your records show what money went to purchase that property?

A. No, they do not. There was some claim; I don't know whether any record shows that that——

Q. I am just referring to the records.

A. No, no.

Q. And that was sold, was it not, by the estate?

A. Yes, it was, yes.

Q. For $27,300 cash? A. Correct.

Q. And that now forms a part of the estate?

(Testimony of Frank J. Fontes.)

A. Less broker's commission and a few expenses on the sale.

Q. Do you have any records, Mr. Fontes, concerning the extent of the entire estate of the decedent, not only here in California but in ancillary states?

A. Well, only what is shown by a copy of a Federal return; it shows the gross there of $189,000.

Q. Do you know where the original—the original of the Federal return I imagine is with the Government? [153]

A. That is with the Government.

Q. Do you have a copy of that Federal return?

A. Yes, I have.

Q. May I see that? A. Yes.

Mr. Monell: We will object to the introduction of the Federal return, if the Court please, on the ground that this action is against an ancillary administrator in California and the return was filed by the domiciliary administrator in Idaho and includes assets not within the power and control of this local administrator. Therefore this Court would have no power to investigate assets outside of the state.

Mr. Ruiz: Is it your contention, counsel, that the domiciliary administrator is not a personal representative of the decedent?

Mr. Monell: This is not the domiciliary administrator here, though, Mr. Ruiz.

Mr. Ruiz: I understand.

(Testimony of Frank J. Fontes.)

Mr. Trowbridge: You are not suing the domiciliary there.

Mr. Ruiz: That is correct.

Mr. Trowbridge: Furthermore, we join in that objection, and we furthermore point out that the entire thing is hearsay. The return is prepared by some man in Idaho on information; we don't know where he got his information, and it is obviously hearsay. We object to it on that ground and also because it [154] is irrelevant, immaterial and incompetent.

The Court: How did these matters come into your possession?

A. We are in communication with the administrators in Colorado and Idaho and one other state and we exchanged copies of documents.

The Court: I am going to allow it to go in on the basis of what the record shows. That doesn't follow that you are bound by it. Let the record show that both sides will have an opportunity after the record is made up to assert their objections, if any, and a motion to strike, if any. I know of no other way to get at the merits of this case unless you gentlemen will suggest some way.

Mr. Monell: Well, sustain all our objections, your Honor.

The Court: You are not waiving any of your legal rights at all?

Mr. Trowbridge: We don't think that this is material which the Court should consider in deciding the merits of the case.

(Testimony of Frank J. Fontes.)

The Court: It may or may not become material. I may make a determination in this case——

Mr. Trowbridge: Aside from that we think it is hearsay and of course this Court cannot consider hearsay.

The Court: If you persuade the Court that it is hearsay, [155] it will go out.

Proceed, counsel.

Q. (By Mr. Ruiz): Can you state from this information what the extent of the entire estate of the decedent is as to value appraisal?

A. On paper and literally, we just read the figures, but there is not only the federal tax of $149,000 but there is also a trustee's suit against us for the entire estate claiming that it is all investment trust monies, we don't own anything.

Q. Mr. Fontes, I have asked you if it had ever been determined that anybody had any portion of this estate or owned any portion of this estate other than the decedent? A. Yes.

Q. And I believe you answered it had never been so determined?

A. That is correct. I still say the same; I say there is a suit pending against us, half tried, in which about a hundred people claim that this is their money.

Q. And you are resisting those claims?

A. Yes, sir.

Q. Very well. Now tell me what the value of the entire estate is from those figures that we have identified?

(Testimony of Frank J. Fontes.)

A. I can't tell you, except to tell you on the contingency—even this report contains contingency claims against the [156] estate of $100,000. It would only be a guess, your Honor; I don't know what the value is.

The Court: Well, that is the answer.

Q. (By Mr. Ruiz): What are the assets of the estate, not the liabilities?

A. What are the assets of the estate?

Q. Yes.

A. Right on hand now we have about 93,000 odd dollars, cash.

Q. That is with respect to California?

A. Yes.

Q. Is the entire estate around $180,000?

Mr. Monell: I will object on the ground that it is obviously hearsay and this witness doesn't know.

A. I can only tell you what I have read in this report.

Q. (By Mr. Ruiz): Will you please tell us what you read in the report with respect to assets?

Mr. Monell: Just a moment. If the Court please, I will object to that on the ground that it is no more admissible in evidence than asking what he read in the newspaper.

Mr. Trowbridge: Same objection.

Mr. Ruiz: As long as it is admitted that the domiciliary administrators are the personal representatives of the decedent, it is just as though the decedent had written this.

The Court: He may state what the record dis-

(Testimony of Frank J. Fontes.)

closes, the record that he has in his office of Public Administrator. [157]

A. This doesn't seem to be the copy of that federal return. Have I got it? Did you make an exhibit out of it or something?

Mr. Ruiz: No; this is from your own files, sir. You showed me one this morning.

A. I loaned it to you a minute ago, a copy of the federal return. This is other stuff that you gave back to me. I thought you offered it in evidence.

Q. Did you give it to Mr. Trowbridge?

A. No, no, no. You had it during this session.

Q. It has got to be around here.

A. I thought it was marked or entered as an exhibit; I don't know which.

The Court: It may be in evidence.

Mr. Ruiz: No.

Mr. Monell: Have you got your watch, Mr. Fontes?

Mr. Ruiz: Is this the item?

A. No, no, it is like a book, the federal return.

Q. This only says $149,000; the other one said $180,000.

A. It's here. I don't know I got it back. Didn't you try to offer it in evidence? The figure shown here is $189,564.68, and then it also recites subject to certain contingencies and I have called attention to the local contingencies.

Q. Thank you. And this is a United States estate tax [158] return? A. Yes.

Q. That you made reference to?

(Testimony of Frank J. Fontes.)

A. Right.

Q. And it makes reference to the report of Robert Russell Sidebotham known under various and sundry aliases? A. That is correct.

Mr. Monell: Our objection runs to the entire line, your Honor.

The Court: Let the record so show.

Mr. Trowbridge: For all parties defendant.

Q. (By Mr. Ruiz): And it refers to various and sundry assets including safety deposit boxes in other jurisdictions?

A. Yes; it speaks for itself.

Q. It speaks for itself. Do you have any objection to my making this part of the record?

A. The Judge will rule on that.

Mr. Monell: We have very strenuous objections. That is what we have been talking about for half an hour.

Q. (By Mr. Ruiz): This is the return and it sets forth shares, certificates, cash and all of the assets. Is that not true, sir—all of the alleged assets?

A. What I mean is as far as I know—I assume that it is an attempt to set forth as true a statement as they were able to, yes. Is that being offered in evidence? [159]

Mr. Ruiz: No, I think we have out of it what we need. I mean, the Court will be able to determine a comparative analysis there. You may keep it, sir. That will be all.

Cross-Examination

By Mr. Trowbridge:

Q. Mr. Fontes, does that federal estate tax return show what the net value of the estate is?

A. Well, that return, I think it has the usual deductions, but then on top of that it has got also what is listed as contingent liabilities, and it lists suits including the Ramsey suit. It does not include, I don't think, the O. A. Arthur suit to establish a trust to the entire estate.

Q. Does it show any net assets on which the domiciliary administrator paid any tax?

A. No, I don't think so.

Q. Would you mind looking at the recapitulation to see what it shows in the way of net estate and taxes due, if any?

The Court: I thought he didn't pay any tax.

Mr. Trowbridge: I think the fact was that they did not pay any tax because they contended that the estate was likely to be insolvent.

A. I wouldn't—let's see; they got the allowable deductions here in excess of $129,564. Gross estate——

Q. Well, here Item 9 in sheet XIX under "Net estate," it is blank, isn't it? [160]

A. That is right.

Q. And it shows total deductions of $189,564.68?

A. Yes.

(Testimony of Frank J. Fontes.)

Q. And it shows total gross estate of $169,421.82, showing a deficit of about $20,000.00, doesn't it?

A. Yes. I think I was in error in reading the last number there as being the gross estate. Actually the gross estate is $169,421.82, and then the deductions plus the exemption add up to $189,000.00, which of course would be no tax.

Mr. Trowbridge: Thank you.

Q. (By Mr. Monell): On top of that there is the O. A. Arthur suit that would consume the entire estate in California?

A. If that suit prevails, it will practically wipe out the entire estate.

Q. One other question, Mr. Fontes. Do you recall the $64,000 that was in the safe deposit box that was paid over to you? Do you recall the denominations of that?

A. Yes, I have a record of that. Better take it down to see if the count comes out right. Are you ready?

Q. Yes.

A. Six $1000 bills; 17 $500 bills or greenbacks, whatever you want to call them; 39 50's. This looks like they slopped over a couple of figures one on top of the other. That is 431 $100 bills.

Mr. Monell: No. [161]

A. The other one looks like two——

Mr. Trowbridge: No, it couldn't be.

The Witness: The figures are slopped over. You see the calculations, they have added them up to $64,770. Right there it looks like 431 hundred dol-

(Testimony of Frank J. Fontes.)

lar bills, 43,100—no, 4,300—no, that is $43,100. This figure is one over the other, but I think that is 216. One figure is written over the other, and the extension of it seems to be $4,920.

Mr. Trowbridge: That is $20 bills.

The Witness: Then there is 28 10's, that is $280; and there is 4 5's, that is $20. It is totaled up here $64,770.

Mr. Monell: That is 246 20's?

A. Two what?

Q. 246 20's?

A. I don't know the 20's—it could be 286 or 216, I don't know which.

Q. But you have a total there of $4920.

A. That is the way it looks. Is that the way it looks to you, the extension, $4920?

Q. That would be 246; I mean it should be.

A. Well, maybe that is what it is. Maybe that is a 4—a 4 on top of an 8 or something.

The Court: The ultimate fact is $64,000 what?

A. We got $64,770.

The Court: Of what significance is the denomination of [162] these bills?

The Witness: I don't know; counsel asked the question.

Mr. Monell: I don't know; it might be interesting later in the trial.

The Court: That is all right. Proceed.

Mr. Monell: That is all, Mr. Fontes.

(Testimony of Frank J. Fontes.)

Redirect Examination

By Mr. Ruiz:

Q. In this estate that has a value of less than nothing there have been about $13,000 worth of attorneys' fees paid on it so far, haven't there?

A. Yes, under order of court.

The Court: Well, you wouldn't complain about that, would you, being an attorney? What is that?

Mr. Ruiz: I think the Court can draw an inference that somebody is fighting over something.

Q. This Ramsey case was very important, too, wasn't it?

A. Well, I can't tell you; they are all important.

Q. Well, this Ramsey case that you made reference to as taking down this estate materially, that has already been settled, hasn't it?

A. Yes, under a petition addressed to the Probate Court.

Q. And under the settlement Mrs. Ramsey is going to get $10,000, is she?

A. I don't remember the exact terms of the settlement. They were arranged between the counsel and Mr. Jepson, attorney for [163] Mrs. Ramsey.

Q. Isn't that a part of the file?

A. The file speaks for itself.

Mr. Trowbridge: Object to that as incompetent, irrelevant and immaterial. That has been settled. Why go into that?

The Court: We are not going to go into some

other court action here, are we? It serves no purpose.

Mr. Ruiz: Very well, that is all.

Mr. Monell: That is all. No questions.

The Witness: Is that all, your Honor?

The Court: As far as I am concerned, that is all.

Certificate of Reporter

I, W. A. Foster, official reporter and official reporter pro tem, certify that the foregoing transcript of 53 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER. [164]

SAM A. SCHNEIDER

called as a witness on behalf of the plaintiff; sworn.

The Court: What is your full name?

The Witness: Sam A. Schneider.

The Court: Where do you live?

The Witness: 1846 22nd Avenue.

The Court: Your business or occupation?

The Witness: Investigator.

The Court: Investigator?

The Witness: Firm of Krout & Schneider.

The Court: How long have you been so, Mr. Schneider?

(Testimony of Sam A. Schneider.)

The Witness: Twenty-eight years.

The Court: Here in San Francisco?

The Witness: Yes, sir.

The Court: The attorneys have got your history, I have no doubt about that. Proceed.

Direct Examination

By Mr. Ruiz:

Q. Were you called upon to investigate something in this case?

A. I personally was not, no.

Q. What is the name of your firm?

A. Krout & Schneider.

Q. Are you the Schneider that is on the second name? A. Yes.

Q. As a member of that firm was the firm called to investigate [165] certain matters?

A. I assume, your Honor. I didn't handle it in any phase of it.

Q. Well, do you know or don't you know whether you handled it or not?

A. All I know is that we have a file.

Q. What is the name of the file?

A. I would have to look at this; I haven't look at it at all. In the Matter of the Estate of Robert Russell Sidebotham.

Q. Is that the first time you ever saw that just now?

A. I just took the file; I didn't look at it. I took it out. It was in the warehouse and I sent for it this morning. I took the file as it was.

(Testimony of Sam A. Schneider.)

Q. Have you ever seen that before?

A. No, I personally have not. Mr. Krout handled this entire matter.

The Court: Who?

The Witness: Mr. Krout, my partner.

Q. Where is he?

A. He is here. He has been away for the last two weeks and arrived back this morning from Los Angeles.

Q. (By Mr. Ruiz): He is in town?

A. Yes, he is here.

Q. Is he available as a witness in this case? [166]

A. He didn't handle the investigation himself either; he directed the investigation. He is available.

Q. And did the investigation have to do with the activities of the deceased, Robert Sidebotham?

A. I don't know that.

Q. Were you employed by someone—was your firm employed by someone to conduct this investigation? A. I assume they were.

Q. Do you receive any monies that are paid to your firm? A. The girl accounts for that.

Q. Do you know whether your firm received any monies that you got a part of for this investigation? A. No, sir, I don't.

Q. What do you have in your possession there in the file? A. Numerous papers, reports.

Q. Does the black file that you have, the first one there, contain a signature?

(Testimony of Sam A. Schneider.)

A. No signature; no, sir.

Q. Does it have any lettering to show where it is from?

Mr. Trowbridge: Just a moment, your Honor. I object to any examination on this file before I ask a few questions of Mr. Schneider because it is a confidential report. It says so right on top of it.

Q. Mr. Schneider, do you know whether I ordered that report from your firm? [167]

A. I don't know firsthand, no, sir; no, I had nothing to do with this file.

Mr. Trowbridge: I submit, your Honor, before counsel goes on a fishing expedition through that file that we had better get Mr. Krout here to find out where it came from and who ordered it, because it is a confidential communication which I ordered for the defense of three actions, including this action and it contains very important information which should be kept confidential in my duties as attorney for the defendant administrator in this case. Mr. Schneider has said very frankly he doesn't know a thing about it, and the way to go into it further, if Mr. Ruiz wants to do that, is to have him get Mr. Krout out here and we will find out whether it is confidential or not. I know this, because I ordered it, and it was sent to me under a forwarding letter, confidentially as attorney for the defendant in this case.

Mr. Monell: We join in the objection, if the Court please.

(Testimony of Sam A. Schneider.)

Mr. Trowbridge: Furthermore, it is all hearsay, everything in the file.

Mr. Ruiz: Is it your contention, counsel, that this information is privileged?

Mr. Trowbridge: Of course it is privileged. Just because the administrator here has a dual capacity, one as a Public Administrator, and second as administrator of a [168] private estate, doesn't change the rules about privity because he is defending here as an administrator of a private estate and I am his attorney, and this material was ordered by me for my information in defending this case. It is certainly privileged under Section 1881 of the Code of Civil Procedure and under common law rules.

Mr. Ruiz: Would you not admit, counsel, that in the event you had mailed me any portion of this report that you would have waived your privilege?

Mr. Trowbridge: No, I don't think so.

Mr. Ruiz: As a matter of fact, did you not mail me a portion of this report?

Mr. Trowbridge: I did.

Mr. Ruiz: It is no longer privileged.

Mr. Trowbridge: I don't agree with you at all. In the first place, the privilege has to be waived by the client; in the second place, the privilege was not waived for the purpose of introducing it in evidence.

The Court: Maybe I can be helpful at this juncture. The witness on the stand indicates he knows nothing about it. Are there any further questions?

(Testimony of Sam A. Schneider.)

Mr. Ruiz: I want to have him compare what ever records he has with a part of the record that was mailed to me by counsel who now says it is privileged and thereby waived the privilege. [169]

The Court: Proceed.

Q. (By Mr. Ruiz): I will show you here about 40 pages concerning the activities of Mr. Sidebotham and ask you if you can locate those pages among your reports concerning the decedent's activities with respect to oil leases, and encompassing a period not only after the year 1947 but before the year 1947 as well.

Mr. Trowbridge: Your Honor, it is all based on reports from an investigator who isn't in court. It is obvious it is hearsay. On no possible theory could you escape the hearsay rule. Certainly Mr. Schneider didn't make the report and Mr. Krout didn't make the report.

Q. Isn't it correct in your office that all of these investigations are turned over to independent—I mean investigators? A. Employees.

Q. ——who go out on the job and they come back and they dictate the report?

A. No, they write the report, which is then retyped in the office.

Q. The investigator writes the report?

A. Yes.

Mr. Trowbridge: There is the man they should bring in here.

The Court: What is his name?

A. Now that I don't know. Mr. Krout would

(Testimony of Sam A. Schneider.)

know that, the [170] man assigned to it or the investigator assigned to it.

The Court: Who was assigned to this case?

A. Who was assigned to it?

The Court: Yes.

A. Mr. Krout handled the investigation. He assigned someone. I don't know. These reports don't give the name of the investigator.

Q. I understand. Is he the one that handled this transaction? A. Yes, sir.

Q. In its entirety?

A. Yes, sir; that is, he controlled the operation of the investigator.

Mr. Ruiz: Mr. Trowbridge, will you have Mr. Krout here tomorrow morning?

Mr. Trowbridge: He isn't my party. I have no control over Mr. Krout.

Mr. Ruiz: There is a petition on file, your Honor, which indicates that the administrator and Mr. Trowbridge—it was Mr. Trowbridge that recommended his firm and this firm reported to Mr. Trowbridge the results of his findings.

The Court: If I followed counsel, he will be here tomorrow morning.

Mr. Trowbridge: I don't know. I have no control over him. [171]

The Court: But you indicated he is available and he will be here tomorrow morning.

Mr. Trowbridge: If Mr. Ruiz wants to subpoena him, it is all right with me. I have no way of getting him out here.

(Testimony of Sam A. Schneider.)

The Court: Very well. Subpoena him.

Mr. Ruiz: I will subpoena him. I would like at this time to have the Court impound those documents.

The Court: Let them be admitted in evidence for purposes of identification.

Mr. Ruiz: For purposes of identification.

Mr. Trowbridge: I would like to request, your Honor, that the envelope be sealed because there are confidential matters in there not only pertaining to this case but also to the other case.

The Court: Have you got some stickum there, Mr. Clerk?

The Clerk: I can take care of sealing it, yes, your Honor.

Plaintiff's Exhibit 13 for identification.

(Whereupon, papers referred to were marked Plaintiff's Exhibit No. 13 for identification and were placed in a sealed envelope.)

Q. (By Mr. Ruiz): You say that Mr. Krout is in town? A. Yes.

Q. When did you see him?

A. This morning. He arrived back this morning. [172]

Q. Where did you see him, sir?

A. In the office.

Q. And he is your associate? A. Yes.

Q. Can you give me his home address, sir?

A. He lives in San Mateo. I don't have the ad-

(Testimony of Sam A. Schneider.)

dress here. It is in the office. He lives in San Mateo.

Q. Can you give me his telephone number, if you know?

The Court: I think there ought to be some understanding here with relation to his appearance without issuing a subpoena.

Mr. Trowbridge: I have no control over him or I would bring him in. If they can get him here, it is all right with me.

Mr. Ruiz: Will this witness be ordered to return tomorrow morning?

The Court: The witness on the stand?

Mr. Ruiz: Yes, your Honor.

The Court: For what purpose?

Mr. Ruiz: Because I am going to look up some law tonight in the law library and I want him here because he is a member of the firm and we have some matters here for identification. I think I can pursue this be it better prepared. Apparently there is an obvious effort here to conceal.

The Court: There won't be anybody there. You have a [173] partner, do you? A. Yes, sir.

The Court: There won't be anybody to take care of the business. Let's take one of them at a time.

Mr. Ruiz: The Court is optimistic. I don't know whether the other partner will be here.

The Court: Counsel indicates that he will. Do I understand you, counsel?

Mr. Trowbridge: What was that, your Honor?

(Testimony of Sam A. Schneider.)

The Court: Do I understand that he will be here?

Mr. Trowbridge: I don't know. To be perfectly frank with the Court, this is not the only firm we have used, and since this job was done I have employed another investigator. They are independent contractors. I have no control over their movements; I can't order them to be out here tomorrow morning.

The Court: Well, I want to make the Court's position clear. Before I get through with this case —I don't want to do violence to the law, but I wish to hear every detail of it insofar as getting the merits of this case if it takes the next month.

Mr. Trowbridge: We understand that.

The Court: I say that kindly.

Mr. Trowbridge: Yes.

The Court: So we may as well meet this situation for [174] what it is worth.

Mr. Trowbridge: I am not trying to conceal Mr. Krout. I have no control over him.

The Court: I know. You have a right to protect the people that you represent.

Mr. Trowbridge: It isn't that.

The Court: I don't want to have to return you tomorrow, but I want to have some assurance that either one or both of you will be here. What will we do about that? I want to make it convenient for everybody in interest if possible.

The Witness: I will be back if he wishes.

The Court: Do I understand you insist on the witness coming back?

Mr. Ruiz: Yes, I do, your Honor.

The Court: Very well. Step down.

Maybe we will take a recess and clear up some of this fog.

Mr. Monell: If the Court please, before you take the recess, Mr. Schneider says that he can get his partner out here tomorrow morning.

The Court: If he does, is he excused?

Mr. Ruiz: If his partner comes, I will excuse him, sir.

The Witness: O.K.

The Court: That is what I was trying to get at.

(Recess.) [175]

Mr. Ruiz: If the Court please, I believe that Mr. Trowbridge has stated that he has a report made by William Dolge & Company, licensed accountants and investigators. These licensed accountants and investigators made a report with respect to assets accumulated subsequently to 1946 in this estate and I think it is quite material. I would like to request of Attorney Trowbridge that he produce that report. That report, according to the administrator, was paid for out of administrative funds for the purposes of gathering information.

We must remember one thing: that all of these matters are items that were continually within the knowledge of the decedent who is no longer with us; that the decedent theoretically is a party to this action, and I believe the Court has the authority

and the power to order those produced; otherwise, that type of concealment would continue the perpetration of a fraud and concealment.

Mr. Trowbridge: Your Honor, in spite of the honeyed words of Mr. Ruiz, it is all an attempt to try to violate the privilege between client and attorney. This letter, this report was rendered at my request. I employed the firm of William Dolge & Company to make some investigations for me to aid the defense of this case and of two other cases. The report is addressed to me personally and it covers investigations involving this case as well as other cases and [176] there is no claim that privilege has been waived. Mr. Ruiz himself would have to admit it is privileged. And just because it happens to be paid for by estate funds doesn't mean anything. Every estate that is defending a suit has to pay the expenses of defending it, naturally. William Dolge & Company wouldn't work for me for nothing and I wouldn't pay for it out of my own pocket. Naturally I would expect the estate to reimburse me for the incurring of the expense of this report, and I submit that it is privileged.

The law writers—Professor Wigmore, for instance—recognizes in his textbooks that it may work some hardship in some cases, but in view of the policy of the law dealing with privilege between client and attorney and priest and confessor and physicians and so on, there is a higher public policy that requires that those matters be kept secret. And for that reason I stand on that privilege. Fur-

thermore, the report is all hearsay, every bit of it, and incompetent for that and other reasons.

The Court: Do you have any authorities to sustain your position, and if so, what are they?

Mr. Ruiz: May I be permitted to present authorities in the morning on that, your Honor?

The Court: Very well.

Mr. Monell: I will be glad to cite some cases supporting our theory in the matter, if the Court please. [177]

Mr. Ruiz: Will you kindly do so?

The Court: Save them until tomorrow morning.

Mr. Ruiz: Inasmuch as I had expected to devote this particular time to the matters we have been discussing, I have another witness here, but it is defensive matter, if I may call it out of order, and dismiss him.

The Court: Is that agreeable, gentlemen?

Mr. Monell: Yes, sir.

Mr. Ruiz: Mr. Scardino.

JOSEPH SCARDINO

called as a witness on behalf of plaintiff; sworn.

The Court: What is your full name?

A. Joseph Scardino.

Q. How do you spell your name?

A. S-c-a-r-d-i-n-o.

The Court: Where do you live?

A. Oakland.

Q. At what address?

A. 1516 Tenth Street.

Q. Tenth Streeet? A. Yes.

(Testimony of Joseph Scardino.)

Q. What is your business or occupation?

A. Laborer.

Q. Employed where?

A. Albers Milling Company. [178]

Q. How long have you been so employed?

A. Five years.

The Court: Take the witness.

Direct Examination

By Mr. Ruiz:

Q. Do you reside in Oakland with your family, sir? A. Yes, sir.

Q. Are you acquainted with an address known as 380 Union Avenue? A. Yes, sir.

Q. What kind of a building is it?

A. It is a three-story building.

Q. Is it flats? A. Flats.

Q. And around the year 1940 was that building owned by someone that you know?

A. Owned by my father and mother.

Q. Owned by your father and mother?

A. Yes.

Q. Did you know Mr. Robert Sidebotham?

A. Well, with my father one Sunday morning I met him upstairs when he was paying the rent.

Q. Just a minute. Did you know Mr. Robert Sidebotham?

A. I was introduced by Mrs. Sidebotham.

Q. Just listen to my question. Did you see him? [179] A. Yes.

(Testimony of Joseph Scardino.)

Q. Very well. Did you have occasion to visit these flats during the year 1940?

A. Yes, I had.

Q. On more than one occasion? A. Yes.

Q. On many occasions?

A. My mother was sick and I had to go up there and see her.

The Court: Speak up. I can't hear you.

The Witness: My mother was sick in bed.

Q. (By Mr. Ruiz): And you went up there to visit your mother? A. Yes.

Q. When was the first time you ever met Mr. Robert Sidebotham?

A. Upstairs in my father's apartment.

Q. Was that at 380 Union Street?

A. Yes, sir.

Q. And do you know when in 1940 that was?

A. Well, it was about February.

Q. About February of that year, 1940?

A. 1940, yes, sir.

Q. And how do you know it was the year 1940?

A. I happened to know because my father and I, we are not on speaking terms for ten years. [180]

Q. Just a moment. I can anticipate the difficulty the reporter has got. I am having some difficulty myself. Would you read back the question, Mr. Reporter?

(Question read.)

A. My father and I were disagreeable in talking terms for ten years; this just happened in 1939.

(Testimony of Joseph Scardino.)

The Court: Speak up louder.

The Witness: I can't talk very loud.

The Court: Yes, you can. I realize that you just went on the stand and probably not used to being in court. Repeat that over again and slowly so the reporter can get it, please. Read the question again for him.

(Question reread.)

A. My father and I were mad at each other for ten years and I wasn't having—my father was sick and some friend of his asked me to go down and see him; my mother was sick, so they took me over there. That is how I know it was 1940.

Q. (By Mr. Ruiz): And when did you first meet Mr. Sidebotham?

A. That was on a Sunday morning.

Q. Of what month? A. In February.

Q. Of 1940? A. 1940, that's right.

Q. Was Mrs. Sidebotham there, too? [181]

A. Yes, sir.

Q. Was he introduced to you by someone?

A. By Mrs. Sidebotham.

Q. What did she say?

A. "Meet my husband."

Q. What did he say?

A. "Pleased to know you." We shook hands.

Q. What was he doing then?

A. He was paying rent. He just got through paying his rent when I got upstairs.

(Testimony of Joseph Scardino.)

Q. Who did he pay the rent to?

A. My father.

Q. By the way, is your father living?

A. No, sir.

Q. Is your mother now living?

A. No, sir.

Q. Did anything else happen?

A. No, just had a few drinks, that's all. After awhile the lady left and I stayed with my father the rest of the day.

Q. Did you see Mr. Sidebotham after that?

A. A few weeks after I met him again.

Q. How long afterwards?

A. About three weeks after. A Sunday morning I came to see my father and he happened to be out there by his apartment house stairs and he called us in to have a drink or smoke a [182] cigar in his front room. We stayed about a half an hour and then I went downstairs to see my mother.

Q. Who was smoking a cigar?

A. Mr. Sidebotham.

Q. Mr. Sidebotham? A. Yes.

Q. Did anything else happen?

A. No; just had a few drinks, that's all.

Q. Were you alone or with someone?

A. No; my wife was with me.

Q. You had your wife with you at that time?

A. Yes.

Q. And how long did Mr. Sidebotham stay this time?

(Testimony of Joseph Scardino.)

A. Well, we stayed a half an hour and went upstairs to see my mother so I don't know what happened after that.

Q. You say you went up to your mother's?

A. I stayed about a half an hour and then I went upstairs. My wife and I went upstairs to see my mother and father.

Q. Did you ever see Mr. Sidebotham any time after that? A. Well, occasionally.

Q. Pardon?

A. Yes, about four times altogether.

Q. How many times? A. Four times.

Q. Four times you saw him there? [183]

A. Yes.

Mr. Ruiz: You may cross-examine.

Mr. Trowbridge: No questions.

The Court: Step down.

Mr. Ruiz: I have no further witnesses at this time, your Honor.

I wanted to utilize the time. We did some mathematics together and I expected to get some additional information through the witness.

Mr. Monell: Do you need the probate records? The clerk is still here.

Mr. Ruiz: There is one record I haven't been able to locate yet.

The Court: The clerk may be able to help you.

Mr. Ruiz: There is a petition here for this firm of Dolge & Company is requested to procure information after 1946. I remember reading it. I think that the date is very important and I would like to make reference to that. That is the only other item of record that I would need. Other than that

I don't need the records any more, sir. But I have to have the records kept over here for that purpose.

The Court: The clerk is always accommodating. He will help you in any way he can, I am sure.

Mr. Ruiz: I may be able to pick it up once again if I go through this rather hurriedly. I have found it. I would [184] like to read in evidence a petition for instructions filed October 13, 1953, by Henry J. Boyen, attorney for W. A. Robison, under verification before a notary public the 9th day of October, 1953:

"Pettition for Instructions.

"Petition of W. A. Robison as administrator of the estate of the above-named decedent specifically shows that heretofore an order was made herein employing William Dolge & Company to perform certain searches in connection with the above-entitled estate, and in particular concerning the earnings of the decedent on or about the year 1946, to the time of his death, and by the terms of said order, said William Dolge & Company were to be paid on an hourly basis not to exceed the sum of $1,000 unless otherwise ordered by this Court."

That is the portion that I wanted to read into evidence.

Mr. Trowbridge: Pardon me just a minute, your Honor. No questions.

Mr. Ruiz: That is all, your Honor.

May we adjourn until tomorrow morning? I wanted to go into material with these other people if I can get this man back.

The Court: Very well. We will take an adjournment until 10:00 o'clock tomorrow morning.

(Thereupon, further hearing continued to October 26, 1955.) [185]

Wednesday, October 26, 1955—10:00 A.M.

The Clerk: Sidebotham v. Robison, for further trial.

Mr. Ruiz: Ready.

Mr. Trowbridge: Ready.

Mr. Ruiz: Is there a representative of Krout & Schneider in the courtroom?

Mr. Trowbridge: Yes.

Mr. Ruiz: Will you take the stand, sir?

J. E. KROUT

called as a witness of behalf of plaintiff; sworn.

The Clerk: State your full name, your occupation and your address to the Court.

A. J. E. Krout. I am a partner in the firm of Krout & Schneider, investigators, 350 Sansome Street.

Direct Examination

By Mr. Ruiz:

Q. As investigators, what do you do, sir, generally? A. General investigating, all types.

Q. Were your services retained in this case by anybody? A. By Mr. Trowbridge.

Q. That is in connection with the estate of Sidebotham? A. That is correct, sir.

(Testimony of J. E. Krout.)

Q. And did you do certain work in connection with that case? A. We did. [186]

Q. And did you examine many records and documents and interview many persons?

A. No, I didn't do the work personally. The work was—the case was assigned to us by Mr. Trowbridge and I assigned it to one of our investigators to do.

Q. Was that investigator under your supervision? A. Yes, sir.

Q. Was a report rendered to you?

A. The report is rendered to me.

Q. And in turn did you render that report to Mr. Trowbridge? A. Yes, sir.

Q. Did this man under your supervision examine records and documents and interview many persons?

A. I haven't seen the file for quite a few months but, as I remember it, that was the gist of what we had to do.

Q. I will hand you an envelope which is marked Plaintiff's Exhibit for identification No. 13 and ask you to open that and examine the contents.

A. Yes; this is our file.

Q. Will you please tell us what the file note indicates, but what it is made up of, what kind of reports are there?

A. Well, the file is made up of reports as rendered to us by the investigator who was doing the work, and then the compilation of these reports

(Testimony of J. E. Krout.)

were made up to be submitted to Mr. Trowbridge. [187]

Q. I'm calling your attention, sir, to a document filed in this action which is denominated "Request for Answers Pursuant to Rule 36, F.R.C.P.," and more particularly to a series of documents beginning with page 1, called "Oil and Gas Lease," and ending with page 70. Will you kindly glance through this for purposes of refreshing your memory?

Mr. Trowbridge: Where does that start?

Mr. Ruiz: Page 1 to page 70.

Mr. Trowbridge: 1 to 70 of the interrogatories?

Mr. Ruiz: It is in the file. You were served with a copy.

Mr. Trowbridge: May I see that a minute?

The Witness: I don't remember any of this, counsel.

Q. (By Mr. Ruiz): Will you examine your files and see if you can locate a report that you gave to Mr. Trowbridge?

A. On any of these matters?

Q. On precisely those matters.

Mr. Ruiz: Counsel, will you stipulate that those items to which I have made reference were items that were handed to you by this firm?

Mr. Trowbridge: I am trying to refresh my memory—if you will just give me a minute or two to refresh my memory. I will make this answer: There seem to be about 71 of these pages—70, I understand. Without taking them each one sepa-

(Testimony of J. E. Krout.)

rately, I wouldn't know for sure, but I would [188] say that I think that these are probably copies of exhibits attached to the report of Krout & Schneider. They look familiar to me and I think that is probably correct.

The Court: They may go in subject to your motion?

Mr. Trowbridge: Subject to the motion.

The Court: And any correction?

Mr. Trowbridge: Yes, that may be made.

Mr. Ruiz: Very well.

Mr. Trowbridge: I am not agreeing to the admissibility of the evidence—I want to argue that further—but I mean as far as identification is concerned, I would be willing to stipulate, subject to correction, that those seem to be copies of those exhibits.

Q. (By Mr. Ruiz): Now, taking into consideration the statement made by Attorney Trowbridge, do you recall that those were exhibits attached to a report made by your investigator under your supervision?

A. Well, we did supply him with a lot of exhibits, copies of which I don't have.

Q. That is the reason I referred your attention to those particular copies. Taking into consideration what Attorney Trowbridge has said, that those exhibits came from your firm, would you say that those were the exhibits you furnished?

A. I wouldn't want to say unless I would check them [189] carefully with what I have in my report

(Testimony of J. E. Krout.)

here. I know we did furnish him with a bunch of exhibits.

Q. Well, do you want to check those carefully or do you want to accept the stipulation or statement by Attorney Trowbridge?

A. I will accept the stipulation made by counsel.

Q. How much was your firm paid to make this investigation, sir?

A. Oh, I don't have the bill here, but I think it was close to a thousand dollars.

Q. Is it not a fact, sir, that predicated upon those investigations that you made, that you ascertained that Mr. Sidebotham was extremely busy prior to the year 1946 in the field of oil and gas leasing and speculation?

Mr. Trowbridge: Just a moment, please. That calls, first, for the conclusion of the witness, and, secondly, anything that he would testify to would obviously be hearsay. I think Mr. Schneider testified yesterday that this report was dictated by an investigator to a stenographer, then the stenographer wrote it, and they submitted it to Mr. Krout. I think that is Mr. Schneider's testimony—it would be the usual custom. Now, anything that Mr. Krout would testify to in answer to this question would necessarily have to be based on about three steps of hearsay. I therefore object to it as being incompetent, irrelevant and immaterial and [190] hearsay.

Mr. Monell: We join in the objection, if the Court please.

(Testimony of J. E. Krout.)

Mr. Ruiz: I am looking for some law if the Court will indulge me just a second.

This case indicates that there was no record, no original evidence concerning the books of account. When there is no original record, then secondary, indirect and circumstantial evidence is admissible. Oftentimes the only evidence available is negative evidence.

We do not know and cannot tell what documents were accessible to this firm until we know what they inspected and examined. If they examined original records, which were numerous and which the matter marked for identification indicates, and the evidence sought is only a general result of the whole such as do these indicate that he was very busy, do these indicate that he had many transactions, then that is admissible because it constitutes a summary.

This was done in the ordinary course of employment by this man on behalf of the administrator.

Code of Civil Procedure, Section 1937, the original of any writing must be produced except as provided in Civil Code 1855, which means that a person who has gone into that material can testify to a general conclusion.

Mr. Trowbridge: Will you read that Section 1855?

Mr. Ruiz: I don't have that one out here. If you have, [191] I will be very glad to.

Mr. Trowbridge: No, I haven't.

Mr. Ruiz: May we have that code section?

(Testimony of J. E. Krout.)

Counsel has asked for it—the Civil Code of Procedure.

Q. In this connection, this man interviewed many people, didn't he?

A. It was a lady, sir.

Q. This lady interviewed many people?

A. Yes, sir.

Q. She had many private conversations and had dealings with Mr. Sidebotham, didn't she?

A. I believe so.

Q. And many of those persons were asked to exhibit leases and documents, were they not?

A. As far as I remember, yes.

Q. And this encompassed the activities of Mr. Sidebotham for how far back?

A. I would have to see this report.

Q. What is the year that your report indicates?

A. Counsel, we worked this matter in 1952, and I haven't seen this report in many, many months, so I don't recall exactly what is in it.

Q. Did you make any memorandum as to how far back you went in your investigation?

A. Well, it would show in the report, but I would have to [192] read this whole report to find out.

Q. Do you want to read through to see if you can find a date and number while we are waiting for the Civil Code of Procedure, sir?

A. Yes.

The Court: Code of Civil Procedure?

(Testimony of J. E. Krout.)

Mr. Ruiz: California State Code of Civil Procedure.

The Court: California?

Mr. Ruiz: Yes, sir.

Section 1937, CCP.

"Original writing to be produced or accounted for. The original writing must be produced and proved except as provided in Sections 1855 and 1919."

The Court: What section is this?

Mr. Ruiz: Section 1855:

"Contents of writing how proved. There can be no evidence of the contents of a writing other than the writing except in the following cases: * * * Subsection 5: When the writing consists of numerous accounts or documents which cannot be examined in court without great loss of time and the evidence sought from them is only a general result of the whole."

The Court: What is the other section?

Mr. Ruiz: Pardon, sir. That is the section.

The Court: There is another section, isn't [193] there? It quotes two sections.

Mr. Ruiz: There are five sections: "In the cases mentioned in subdivisions 3 and 4 a copy of the original or of the record must be produced; of those mentioned in subdivision 1, either a copy or oral evidence of the contents."

Subdivision 5 is what I am relying upon. In other words, the evidence here is that there were interviews had with private parties; that private

(Testimony of J. E. Krout.)

parties exhibited documents; that private parties had conversations with reference to oil and gas relationships with the decedent. The result of the conferences and the result of the numerous documents is one isolated fact which I am asking this witness, and that was the amount of activity. I am not asking him for anything else but that. I ask him how far he went back so that this Court may not be able to indulge in an inference later on that the man didn't do anything before 1946. There must be some evidence, in view of the lack of evidence, of records, that this man was actively engaged in this business prior to that time. That is the only thing I am asking from this investigator.

Mr. Trowbridge: Code Section 1855 has nothing to do at all with the subject of hearsay. And I say again that it is quite obvious that this is hearsay based on hearsay.

This Section 1855, subsection 5, applies and is used [194] frequently in a situation where accountants have gone over a set of books personally and made a summary of what the books show, a summary of what the journal shows and a summary of what the ledger shows, and then the accountant is allowed to testify from his summary what the books showed, subject of course to cross-examination and correction as to omissions and errors. But this doesn't apply to this case in any way, as I see it, and it certainly doesn't cover our objection that it is hearsay.

(Testimony of J. E. Krout.)

The Court: Will you read the question again, Mr. Reporter?

(Following question read: "Is it not a fact, sir, that predicated upon those investigations that you made that you ascertained that Mr. Sidebotham was extremely busy prior to the year 1946 in the field of oil and gas leasing and speculation?")

The Court: The objection will be overruled. I will allow it in subject to a motion to strike over your objection.

Q. (By Mr. Ruiz): Did you understand the question? A. Yes, sir.

Q. Will you answer it, sir?

A. I can't answer that question honestly, counsel. I think if we are to go into this report my investigator who made it and would be familiar with what she did, should be here to testify [195] from it.

The Court: Is she still in your employ?

A. Yes, sir. You see, I merely supervised this investigation; she handled all the details and made the reports.

Q. (By Mr. Ruiz): Is she in town?

A. Yes, she is here.

Q. She is in your employ? A. Yes, sir.

Q. Will you have her come to court this morning? A. This morning?

Q. Yes.

A. Well, I don't know where she is right now.

(Testimony of J. E. Krout.)

She is out on a case. I can have her come up here as soon as I can reach her.

Mr. Ruiz: Well, we may be able to cut across here. You were the supervisor and I have called your attention to 70 documents.

A. Yes, now——

Q. I have likewise called your attention to your records and more particularly to indicate how far back you went in your investigation. Do your records show that?

A. Whatever these records would indicate, that is how far back we went.

Q. Whatever these records would indicate——

A. Whatever these exhibits, if they are the exhibits that I gave to Mr. Trowbridge, then that would indicate the length [196] of time that we covered.

Q. In other words, here is one that says May '35, October, 1935; November, 1935——

Mr. Trowbridge: Just a moment. I think I can help here. There seems to be a misunderstanding on the part of Mr. Krout. Mr. Ruiz asked him what period of time his report seemed to cover, meaning by that what period of time the investigation covered, what years of the activity of Mr. Sidebotham the report covered; is that right?

Mr. Ruiz: Yes.

The Witness: You mean the time that he worked on it?

Mr. Trowbridge: No. Mr. Krout seemed to have the impression that these exhibits which are refer-

(Testimony of J. E. Krout.)

ences to deeds showed the period covered. Now, I think, if I may interrupt, that what Mr. Ruiz has in mind, Mr. Krout, is what period of time of the activities of Mr. Sidebotham was covered, not necessarily the dates of deeds. And another question I would like to ask to clarify is this: Isn't it a fact that your report was primarily a report on Mrs. Ramsey?

A. Primarily.

Q. And would your reports show whether you made any report as to the activities of Mr. Sidebotham?

A. Not other than what these exhibits would indicate.

Q. Isn't it a fact that anything in the report about Mr. Sidebotham is incidental and that the main purpose of the [197] report was to give a report on the life, business transactions, property holdings and so on of Mrs. Ramsey?

A. That is correct.

Mr. Ruiz: Counsel, for the purpose of cutting across, will you stipulate, without the need of bringing back the file again from the County Clerk's office, that there is a contract there entered into between Mrs. Ramsey and Mr. Sidebotham to the effect that anything and everything taken in her name or his name would constitute them tenants in common? Will you stiplate to that so we can across it in this action?

Mr. Trowbridge: That is substantially correct.

Mr. Ruiz: Very well.

(Testimony of J. E. Krout.)

Q. Can you get that girl here?

A. Yes, I can get her.

Mr. Ruiz: As soon as we finish with this witness, your Honor, the plaintiff is resting in this case.

The Court: Well, what is before the Court now?

Q. (By Mr. Ruiz): Do you wish to go to the telephone and call her?

A. I will call my office and see if she is there.

The Court: We will take a recess.

(Recess.)

Mr. Ruiz: If the Court please, we are ready to enter into a stipulation, and for that purpose the necessity of bringing the employee of the last witness will be dispensed [198] with.

It has been stipulated by counsel representing the respective parties that the evidence would show that prior to the year 1946—that is, from the year 1935 to and through 1946—the decedent engaged in numerous transactions concerning oil and gas leases wherein he has some interest; that said transactions numbered approximately 70.

Mr. Trowbridge: That is correct, your Honor.

Mr. Monell: We will so stipulate, your Honor.

Mr. Ruiz: There is a matter marked for identification here, being Plaintiff's Exhibit No. 13 for identification. It is stipulated by counsel representing the parties here that the same may be withdrawn at this time.

Mr. Trowbridge: It is to be returned to the firm

of Krout & Schneider because it is part of their records.

The Court: Very well.

Mr. Ruiz: The plaintiff rests.

Mr. Trowbridge: This comes as a good deal of a surprise to us, your Honor. I don't know that we can fill up all of the time until noon, but I have some documentary evidence which I will submit to counsel for plaintiff and we may then ask for a continuance until 2:00 o'clock.

Mr. Ruiz: No objection.

Mr. Trowbridge: The first piece of evidence we desire to offer at this time is a grant deed from Ruth M. Ramsey, [199] a widow, granting Russell Sidebotham, a single man, all that property situated in the City and County of San Francisco, State of California, described as follows—rather than reading that description, will you stipulate, or do you want to look it up as to the description, that this is the same case of real estate described in the inventory and appraised at $30,000?

Mr. Ruiz: I will so stipulate.

Mr. Trowbridge: It is signed Ruth M. Ramsey. It is dated March 6, 1950, recorded at the request of the City Title Insurance Company at 30 minutes past 8:00 a.m. March 14, 1950.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit H admitted and filed in evidence.

(Whereupon grant deed was received in evidence and marked Defendant's Exhibit H.)

Mr. Trowbridge: The next document is a certified copy of official certificate of registration, Office of the Registrar of Voters, City and County of San Francisco, State of California, Precinct 33, Assembly District 19; name, Robert Russell Sidebotham; residence, 10 Rossi Avenue; occupation, salesman; height, five feet nine inches; nativity, Idaho. Date of registration: September 19, 1942. Political affiliation: Democratic Party. The other blanks [200] are not filled in. It says, "Date of Registration, September 19, 1942; political affiliation, Democratic Party"; and in the lower left-hand corner it says, "Cancelled M.V. '50."

Now, will you further stipulate that that address, 10 Rossi Street, is the same address as the transaction of the conveyance of real estate by Mrs. Ramsey?

Mr. Monell: No.

Mr. Trowbridge: No, I don't think you understand.

Mr. Monell: No, it isn't the same place.

Mr. Trowbridge: This is the residence of Mrs. Ramsey who is mentioned in the deed.

Mr. Ruiz: This is the address of Mrs. Ramsey where she was living.

Mr. Trowbridge: The apartment house covered by the deed is on Geary Street.

Mr. Ruiz: The Mrs. Ramsey mentioned in the deed is the same Mrs. Ramsey to which reference I made with respect to the contract he had with her?

Mr. Trowbridge: That is correct. The same Mrs. Ramsey.

The Court: Let it be admitted and marked Defendant's exhibit.

The Clerk: Defendant's Exhibit I admitted and filed in evidence.

(Whereupon certificate of registration was received in evidence and marked Defendant's Exhibit I.) [201]

* * *

We will now offer in evidence, your Honor, on behalf of both defendants, a receipt, or I guess it was the original bill from the Pacific Gas & Electric Company for June, 1950, for gas and electricity in the total sum of $5.97, made out to R. R. Sidebotham, 10 Rossi Avenue, San Francisco 18, California, 502½ Geary Boulevard, which was the address of the apartment house that Mr. Sidebotham owned, the grant deed for which we have just introduced in evidence.

The Court: The purpose of the offer is what?

Mr. Trowbridge: It goes toward laches, which we will argue later.

The Court: Let it be admitted and filed.

The Clerk: Defendant's Exhibit J admitted and filed in [203] evidence.

(Whereupon PG&E bill was marked Defendant's Exhibit J and received in evidence.)

Mr. Trowbridge: And for the same purpose we introduce the tax bill covering Block No. 1446, Lot No. 25, which is the Geary Boulevard property owned by Mr. Sidebotham. It is for 1951-1952, and

it is made out to Russell Sidebotham, 10 Rossi, and there is an item in the lower left-hand corner, "Paid by check November 28, 1951."

And your Honor will take judicial notice that in order to have a tax bill issued in the name of Russell Sidebotham there had to be a deed on record on the first Monday in March of 1951.

The Court: Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit K admitted and filed in evidence.

(Whereupon tax bill was received in evidence and marked Defendant's Exhibit K.)

Mr. Trowbridge: Next I have a list of entries to the safe deposit box in the American Trust Company certified by an assistant cashier, brought here by Mr. Byrne, who was on the witness stand. I am only asking that the entries for May 22, 1945, to and including March 13, 1951, be considered in evidence, because the first part of it, the first half of the first page relates to the City Safe Deposit Company box, [204] which we have objected to as being hearsay and not having been authenticated by anybody. So we will only ask that the part which has to do with Box A1917 of the American Trust Company be introduced.

Mr. Ruiz: If the Court please, I object to its introduction unless the entire complementary details of that long document are admitted as well.

The Court: They are all on it?

Mr. Ruiz: If any part of it is admissible for

any specific purpose—going in and out of the box doesn't indicate anything. If any part of it is admissible, the entire matter should go in.

Mr. Trowbridge: This exhibit is as to two separate boxes and two separate banks. We have heretofore objected to anything going in about the City Safe Deposit box, and we would certainly be stultifying ourselves if we offered it now. We are going to move to strike out the two cards of the predecessor institution, and I wish now——

The Court: Wasn't that taken over by the American Trust?

Mr. Trowbridge: It was taken over eventually.

The Court: When?

Mr. Trowbridge: Some time around 1943 or '42; somewhere around there. I don't know exactly. He didn't testify exactly as to w[illegible] [205]

The Court: What objection have you to having the whole document in?

Mr. Trowbridge: As long as we are not bound by the top part of it, I don't care; but we are not offering the top part of this record because we think it is hearsay and we don't think it should go in as against us. If he wants to put in, it can go in over our objection, but we certainly wouldn't offer it.

The Court: Very well. Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit L admitted and filed in evidence.

(Whereupon safe deposit box record was re-

ceived in evidence and marked Defendant's Exhibit L.)

Mr. Trowbridge: Mr. Monell, will you take the stand, please?

There is a matter that comes under the heading of judicial notice. The San Francisco telephone directories issued by the Pacific Telephone & Telegraph Company in February, 1949—no, I am going to start at the other end—in May, 1945; in August—or in November, 1946; in August, 1947; February, 1949, and August, 1950, as appear in the reference library in the City Hall, shows the name of Ruth M. Ramsey at 10 Rossi Avenue, appears in all of those books. That name and address. I offer that. That is a matter that the [206] Court can take judicial notice of because there are directories that are on file in the Public Library.

The Court: Subject to any correction there may be.

Mr. Ruiz: I don't think it is material. I object to it on the ground that it is immaterial, any more than the name of somebody by the name of Smith may appear in a directory. The fact that Ramsey——

The Court: Who is Ramsey? Identify him.

The Clerk: Ruth M. Ramsey appeared in evidence this morning with the same address that Mr. Sidebotham has.

The Court: The investigator?

Mr. Trowbridge: I think there was—I don't know whether it was a stipulation of Mr. Ruiz that

he asked me for; it was just before the noon recess and I think it was brought up that Mr. Sidebotham lived at the house of Ruth M. Ramsey. These bills shows that, the tax bill, water company, gas company and the certificate of registration shows the same thing, that Mr. Sidebotham's address from 1942 on was 10 Rossi Avenue. I just want to show that there was a telephone there. It goes to the question of laches. It shows how easy it would have been to find Mr. Sidebotham if anybody wanted to look for him.

Mr. Ruiz: By calling another woman?

Mr. Trowbridge: The Court can take judicial notice of that or not. I mean, it is in the record. I am just calling [207] it to the Court's attention. The Court doesn't have to take judicial notice of it if it doesn't want to.

Now I will call Mr. Monell to the stand, please.

THEODORE M. MONELL

called as a witness on behalf of the defendant; sworn.

Mr. Trowbridge: This goes also to judicial notice, but I thought I had better put it in through Mr. Monell.

The Clerk: State your name, your address and your occupation to the Court.

A. Theodore M. Monell, 1019 Mills Building. I am a lawyer.

(Testimony of Theodore M. Monell.)

Direct Examination

By Mr. Trowbridge:

Q. You are a lawyer admitted to practice in all the courts of the State of California, including the United States District Court for the Northern District of California? A. That is correct.

Q. And how long have you been practicing?

A. 34 years.

Q. Mostly in San Francisco?

A. San Francisco mostly, yes.

Q. Do you specialize in any particular branch of the law?

A. Real estate and corporation law.

Q. What do you know about a newspaper issued in San Francisco by the name of Edwards' Abstract?

A. That is a newspaper in which is published all of the [208] transaction reflected in the Recorder's office—transfers of property, encumbrances of property, and any matters which are recorded, generally referred to in the newspaper trade as a breviat.

Q. How many times a week is that published?

A. That is issued every day excepting holidays when the Recorder's office isn't open.

Q. How about Saturdays?

A. The Recorder's office not being open on Saturdays, it is not published.

Q. Who are the subscribers to this paper mostly?

Mr. Ruiz: Just a moment, please. I think, your Honor, the best evidence with respect to circulation and what this paper does and so on would be somebody from the office of the newspaper.

The Court: It may be that he knows. I don't know.

Mr. Ruiz: I don't know, either.

The Court: Very well. We will find out. You cross-examine him. It goes to the weight of the testimony.

Q. (By Mr. Trowbridge): Can you answer that question?

The Witness: What was the question?

Mr. Trowbridge: Will you read the question, please?

(Question read.)

A. In general, the real estate brokerage offices in San Francisco, at least the larger ones, are subscribers. [209]

Mr. Trowbridge: That is all.

Mr. Ruiz: No cross-examination.

The Court: Step down.

Mr. Monell: If the Court please, before the defendants rest, we think at this time we should exercise the right which the Court accorded to us of moving to strike certain testimony from the record.

Mr. Trowbridge: May it be understood that these motions are made also on behalf of the administrator?

The Court: May I inquire at this time, is the transcript going to be written up?

Mr. Monell: We don't know at the present time, your Honor.

The Court: All right.

Mr. Monell: We hope not.

We first move to strike out the testimony with reference to Exhibit 6, which is in the testimony of Mr. Daniel J. Byrne, and this testimony was admitted subject to a motion to strike by your Honor—the bank record relative to Box 1861 which was issued by the Security Safe Deposit Company in January 9, 1943, and there was no showing on the part of Mr. Byrne of any familiarity or knowledge with reference to the particular items therein set forth. And the same applies with reference to Exhibit 7, at least insofar as it refers to matters happening before the surrender of the box on [210] May 21, 1945, which was then to a Savings Union office. The original renting of the box was in April 24, 1944. At the time it was the property of the City Safe Deposit Company and it is our position, if the Court please, that that is not substantiated or authenticated properly to be introduced in evidence, and it was admitted subject to being connected up.

Would you like these matters to be taken up and disposed of individually or——

The Court: Do you wish to meet these as we go along, or do you wish to wait until he concludes?

Mr. Ruiz: I will wait until he concludes.

The Court: Very well.

Mr. Monell: Also the testimony of Mr. Fontes, and that was Exhibit 12, which was a typewritten

copy of an excerpt from a portion of an exhibit which was attached to a petition for instructions, if the Court will remember. He testified that he recognized it as being something connected with one of those government returns, and it was admitted, apparently, for two purposes: One, to prove that no tax return was filed in 1946, '47, '48, '49 and '50, and the amount of the total taxes and penalties being $149,639.38. It is our position that this typewritten document is also not authenticated. It was attached to, as I recall, the claim of the government. No, this was attached to a letter from the Dolge firm of accountants who had made some investigation and obviously it [211] would be hearsay twice removed of that firm. It was based upon a report and examination by them of a government record and it would not be admissible here because it was not properly authenticated. And furthermore, it is not verified; there is no statement from which it could be determined who was the author of the statement and it serves to prove nothing, and even if filed as a claim against the estate, it would be no more than any other complaint on file in this court or any other court. The facts of the complaint are not deemed to be true; they are subject to proof, and this claim is admittedly in dispute between the estate and the claimant. That disposes of Exhibit 12—and also of the testimony of Mr. Fontes with reference to the inheritance taxes which was not introduced in evidence, but Mr. Ruiz felt that he had had enough of the material from the report orally read by Mr. Fontes in which he

showed that the estate consisted of $149,000 and that the claims against the estate were $189,000, so that there would be no federal estate tax due. We object to any testimony with reference to the federal estate tax or to the federal estate tax return for the reason that that was prepared by the domiciliary administrator and is not binding upon any party to this action. We had nothing to do with the preparation of it. And the information therein would also be hearsay, because so far as the material selected from the local estate is concerned, [212] it would be based upon the inventory here, and therefore hearsay; and the inventory is part of the record and therefore it is not necessary to introduce the testimony of Mr. Fontes, and it is improper to introduce the testimony of Mr. Fontes as to the contents of that federal estate tax return. When the court, of course, as I said before, admitted that testimony also specifically subject to our right to move to strike it out if it were not properly connected. This motion we at this time are making.

Then Mr. Krout also testified that certain reports were made to him as a partner of Krout & Schneider and this testimony was admitted subject to a motion to strike

It may be that counsel will admit that that should go out because it is of no importance to him inasmuch as the only thing that he wanted to establish was our stipulation that Mr. Sidebotham, the decedent, was busy all during the years 1935 to 1946.

We will ask that all of the matters referred to be stricken from the record on the basis that they

are incompetent, irrelevant and immaterial, not properly authenticated, hearsay, and not binding on any of the defendants in this case.

Mr. Ruiz: It is my suggestion, if the Court please, that the motions to strike interposed by both defendants and the Court's ruling thereon be deferred over to the conclusion of [213] the summation. And I am saying that in the interests of time and continuity. I have prepared a summation at this time where I am going to specifically handle in proper order the points raised at this time, and I think it would be better to do it that way instead of extracting out of place.

The Court: Are you prepared to go on now with them?

Mr. Ruiz: Yes, your Honor.

The Court: Proceed.

(Thereupon, after argument of counsel for the respective parties, the case was submitted for decision.)

CERTIFICATE OF REPORTER

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 214 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ JOSEPH F. SWEENEY.

[Endorsed]: Filed May 4, 1956. [214]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellants:

Excerpt From Docket Entries.

Transcript on Removal From Superior Court in and for the City and County of San Francisco: Petition for Removal; Copies of Original Complaint First Amendment to Complaint and Summons.

Bond on Removal.

Second Amended Complaint.

Third Amended Complaint.

First Amendment to Third Amended Complaint.

Answer of W. A. Robison, Administrator, to Third Amended Complaint.

Answer of Robert and James Sidebotham to Third Amended Complaint.

Amendment to Answer of Defendants.

Amendment to Answer of W. A. Robison, Administrator, and Robert and James Sidebotham.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law.

Judgment.

Petition of Public Administrator for Allowance of Expenses, etc.

Order Denying Petition for Allowance of Expenses, etc.

Notice of Appeal From Judgment.

Notice of Appeal From Order Denying Allowance of Expenses, etc.

Appeal Bond on Judgment.

Appeal Bond on Order.

Appellants' Designation of Record on Appeal.

Reporter's Transcript of Proceedings.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K and L.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 4th day of May, 1956.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET BLAIR,
Deputy Clerk.

[Endorsed]: No. 15,123. United States Court of Appeals for the Ninth Circuit. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, and Robert Sidebotham and James Sidebotham, Appellants, vs. Helene Marceau Sidebotham, Appellee. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, and Frank J. Fontes and Delger Trowbridge, His Attorneys, Appellants, vs. Helene Marceau Sidebotham, Appellee. Transcript of Record. Appeals From the United States District Court for the Northern District of California, Southern Division.

Filed May 4, 1956.

Docketed May 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,123

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, et al.,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Respondent.

STATEMENT OF POINTS UPON APPEAL

The points upon which appellant W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, intends to rely on this appeal are as follows:

I.

Respondent did not prove and the Court erroneously found in its findings of fact that the property in the possession of and owned by Robert Sidebotham at the time of his death was the same property which he owned when plaintiff and he were divorced in the State of Nevada on November 14, 1946.

II.

Respondent did not prove and the Court erroneously found in its findings of fact that the property in the possession of and owned by Robert Sidebotham at the time of his death was the same property which he owned when plaintiff and he were

divorced in the State of Wyoming on November 2, 1940.

III.

That the Honorable District Court herein erred in finding that the decree of the First Judicial District Court of the State of Wyoming, County of Albany, dated November 2, 1940, was void and subject to collateral attack.

IV.

That the Honorable District Court herein erred in not finding and adjudging that respondent's alleged cause of action was barred under the rule of res adjudicata by the decree of the Superior Court of the State of California in and for the City and County of San Francisco, determining heirship in the matter of the Estate of Robert Russell Sidebotham, Deceased, filed therein on December 14, 1953.

V.

The Honorable District Court herein erred in not finding as a fact and adjudging that respondent's alleged cause of action was barred by the provisions of the California Statute of Limitations.

VI.

That the Honorable District Court herein erred in not finding as a fact and adjudging that respondent's alleged cause of action was barred by the doctrine of laches.

VII.

That the Honorable District Court herein erred in not finding as a fact and adjudging that respond-

ent's alleged cause of action was barred under the rule of res adjudicata by the decree of the First Judicial District of the State of Nevada, in and for the County of Ormsby, filed on November 14, 1946, in an action then pending between Madeline Sidebotham (who is the plaintiff in the above-entitled action) as plaintiff against Robert Russell Sidebotham as defendant.

VIII.

That the Honorable District Court herein erred in not finding as a fact and adjudging that respondent's alleged cause of action was barred by the doctrine of equitable estoppel on the grounds set forth in the fifth affirmative defense in this appellant's answer to plaintiff's third amended complaint.

IX.

That the Honorable District Court herein erred in admitting in evidence over the objections of this appellant the following improper evidence:

1. All of the testimony of Mr. Daniel J. Byrne found in the Reporter's Transcript on page 97, line 5, to page 98, line 9; also on page 98, line 20, to page 100, line 4; also on page 102, line 17, to page 104, line 1; and also on page 104, line 25, to page 106, line 22; all on the ground that all of said testimony was hearsay and was not the best evidence.

2. Plaintiff's Exhibit No. 6 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

3. Plaintiff's Exhibit No. 7 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

4. Plaintiff's Exhibit No. 8 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

5. Plaintiff's Exhibit No. 9 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

6. All of the testimony of Frank J. Fontes found in the Reporter's Transcript on page 136, line 13, to page 146, line 25; also on page 147, line 21, to page 153, line 19; and also on page 157, line 11, to page 159, line 14; on the ground that said evidence was hearsay and not the best evidence.

7. Plaintiff's Exhibit No. 12 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

Dated this 15th day of June, 1956.

/s/ DELGER TROWBRIDGE,

/s/ FRANK J. FONTES,

Attorneys for Appellant W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1956.

SUPREME COURT, U.S.

No. 411

No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of ROBERT SIDEBOTHAM, Deceased, et al.,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

OCT 2 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of ROBERT SIDEBOTHAM, Deceased, et al.,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-21-56

NAMES AND ADDRESSES OF COUNSEL

THEODORE M. MONELL,
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For the Appellants.

MANUEL RUIZ, JR.,
704 So. Spring St.,
Los Angeles, Calif.,

For the Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 32531

HELENE MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, et al.,

Defendants.

Before: Hon. Michael J. Roche, Judge.

PROCEEDINGS ON SETTLEMENT OF FINDINGS

Appearances:

For the Plaintiff:
MANUEL RUIZ, JR., ESQ.

For the Defendant:
DELGER TROWBRIDGE and
FRANK J. FONTES, ESQ.

* * *

Monday, February 27, 1956—3:00 P.M.

Mr. Trowbridge: May it please the Court, at this time I would like to file a petition of the Public Administrator and his attorneys for allowance of expenses of defense, including attorneys' fees, and I have delivered a copy to Mr. Ruiz, and I

would like the record to show that I have so delivered a copy to Mr. Ruiz, that he waives notice of time of hearing and consents the matter be heard now.

Mr. Ruiz: That is correct.

Mr. Trowbridge: We have this petition verified, five pages long, and would your Honor like me to summarize it or read it?

The Court: Summarize it.

Mr. Trowbridge: All right, your Honor.

This petition shows that this case was started on October 10, 1952, by the filing of a complaint in San Francisco in the Superior Court, City and County of San Francisco, removed to this court early the following year, February of 1953, because of the fact that the heirs at law were non-residents. The services performed have to do with the settling of the pleadings. First there are three amended complaints. There was an amendment to the complaint, so we had, in effect, four different complaints to analyze, and we filed motions to dismiss as to two of the complaints, and [39*] the motions to dismiss were granted in one case by Judge Murphy.

Then there was a further amended complaint filed, and then Judge Carter granted the second motion to dismiss.

Then there was an appeal taken by the plaintiff to the United States Court of Appeals, as your Honor knows, and we wrote a brief and argued the case.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Then there was a petition for rehearing after the decision against us. Then we had to file a six-page answer to the, I think it was the third amended complaint, and then another amended complaint filed, and we had to file another six-page answer.

Then we took the deposition of the plaintiff in Los Angeles last February 18, and we also propounded interrogatories and had other matters to do. There was a great deal of library work in this case because, as your Honor will remember, we raised the defense of the proceeding in the Superior Court in San Francisco, petition to determine heirship. Then we briefed the matter of the Nevada claim, the effect of the Nevada complaint, the admission in it. We briefed the effect of the Wyoming decree, we briefed the question of tracing assets, we briefed the question of laches and state of limitations, all of which took days and days of work in the library.

Then we had a trial of four days last fall, October 24, [40] '5, '6 and '7, with an oral argument at the end of the trial, and there was a 22-page brief that was prepared by us.

Then we had to consider your Honor's opinion and we proposed amendments to the proposed findings of fact and conclusions of law. And we have also included certain expenses of the administrator, out-of-pocket expenses, which are as follows: four items—expenses of printing brief on appeal, $115.14; expense of printing petition for rehearing, $76.52; the deposition in Los Angeles cost $98.64; and my own traveling expense was $49.15.

Then portions of the transcript on the trial before your Honor were written up, and they cost $92.40.

The petition ends up with a statement that the defense was made in good faith and on reasonable grounds, and we ask for attorneys' fees and expenses that we have listed.

Now, I want to say that I did receive some compensation in the probate court for preliminary work in this case. It was in December of 1954 that I filed a petition in the probate court which covered not only the preliminary work in this case, the early stages of it, but it also covered settling a claim of another woman who claimed a half interest in the estate as a partner.

We had a tax case in the City and County of San Francisco, which we got rid of, and there were many other things, so that the compensation that I got in December of 1954 only [41] covered a small part of the services rendered in this case.

The Court: You are asking for how much?

Mr. Trowbridge: No specific amount mentioned in the petition, but I think that inasmuch as this is a $100,000 estate, a half of the estate is involved here, that under the circumstances I would suggest $7,500 and make an allowance of $1,500 for the work that we were paid for in the probate court, a net of $6,000.

Mr. Ruiz: When counsel handed me this at 3 o'clock, your Honor, I called counsel's attention to the fact that an application for attorneys' fees had been made in the probate court covering not only the perliminary work, but the appeal as well. In

other words, we have here about a five-page recital concerning what Mr. Robison did and what Mr. Trowbridge did, including the trip to Los Angeles, which was mentioned on the application before the probate court; almost four pages of the five pages with respect to work done has already been passed upon by the probate court. I don't have the probate file before me, but——

Mr. Trowbridge: If the facts are not correct, as you state, then I will correct them later. I have the proof right here.

Mr. Ruiz: I wish to be corrected on it because I am drawing upon independent memory. If I recall correctly, the appeal was mentioned. [42]

That is from the equitable side of it, and as I think I mentioned before, as a matter of fact, for the purposes of the record, I would like to know at this time how much fees have been granted to counsel and his associate counsel in this action, as well as Mr. Trowbridge in this matter in the probate court. Would counsel care to answer that question?

Mr. Trowbridge: Certainly.

The Court: Total amount.

Mr. Ruiz: Total amounts.

Mr. Trowbridge: Yes. Before I do that I want to call attention to a statement Mr. Ruiz made that this deposition in Los Angeles was included in the probate allowance. It was not, because the petition was in February, February 18 of 1955. That was the date of the deposition, February 18, 1955, and

the order was made by the probate court in December of 1954.

Mr. Ruiz: I believe, did not the application for attorneys' fees mention the fact that a deposition was to be taken?

Mr. Trowbridge: I am not sure.

Mr. Ruiz: I think it did.

Mr. Trowbridge: But anyway the services were performed after December 1954, with regard to the taking of the deposition. We certainly planned to take it for a long time. [43]

The allowance that was made to me in the probate court in December of 1954 was $4,400, and as I say, that covered the settlement in the Ramsey case, it covered successfully contesting a personal property tax of the City and County of San Francisco for $5,000, it covered a lot of the preliminary work in this case of Arthur, W. A. Arthur against the public administrator which involved the entire estate. There they are asking to have the whole estate set aside for constructive fraud. It also covered a lot of work in connection with the income taxes of the federal government in the sum of $149,000, and for all of that work, including this work that is mentioned here, the preliminary work in this case, including some of the appeal work, as I say, my personal allowance was $4,400 in the probate court.

Mr. Ruiz: What has been the allowance of Mr. Monell?

Mr. Trowbridge: Mr. Monell received $3,600, but he is not petitioning here, because he represents

the heirs, didn't represent the public administrator, and he is not petitioning for any fee.

Mr. Ruiz: How much was allowed Mr. Jepsen, the other attorney?

Mr. Trowbridge: $2,000, and he had nothing to do with this case at all.

Mr. Ruiz: And how much has been allowed the administrator? [44]

Mr. Trowbridge: I am not sure. The administrator, and Mr. Fontes as such, I think were—I don't think anything has been allowed to them as such. There was an early allowance on account of extraordinary fees of fifteen—not extraordinary, on account of ordinary compensation, there was an early allowance of about $1,500 to the attorneys, including Mr. Fontes' predecessor. That was ordinary probate services, and I don't think anything has been allowed to either of the administrators as such.

Mr. Ruiz: There was one more question, if I may be permitted, if the Court please.

Is there any reason why this petition cannot be filed before the probate court as a matter of law?

Mr. Trowbridge: Well, as I explained to your Honor this morning, it seems to me only fair that if this lady is going to take half of the assets of the estate, that her half of the assets should bear the expenses, all the expenses of the litigation in this court, and I don't think it's fair for any of the legal expenses of this litigation, which concerns her half of the estate, to be saddled on the other half of the estate, which has nothing to do with this litigation.

Mr. Ruiz: Now, with the way the matter has been presented to the Court in respect to the judgment, the administrator has been asked to pay in due course of [45] administration. I think that protects any qualms that counsel may have, No. 1; No. 2, I think the record is clear that compensation has been granted for services rendered and that there shouldn't be any duplicity. No. 3, in any event this court does not have jurisdiction with respect to the pleadings, with respect to anything that has been presented in the trial of the case to grant attorneys' fees. No. 4, the California law is clear that attorneys' fees can only be granted when there is some advantage that the administrator has procured on behalf of the estate, and in this particular case there is no advantage. Had the administrator succeeded in this case, the reverse would have been true. For that reason, the plaintiff, or respondent in this motion, opposes the same.

Mr. Trowbridge: I would like to answer the last point first, that is, the Court hasn't any power to grant any compensation because of the fact that the public administrator wasn't successful in this proceeding. We had exactly the same situation in the case of Egert versus Pacific States Saving and Loan. In that case the defense was presented by the beneficiary instead of by the Building and Loan Commissioner because he was on both sides of the fence, and the position that was presented on behalf of the Building and Loan Commissioner was unsuccessful in the defense of this action by the depositors of Fidelity Savings and Loan. [46]

Also, the court in that case passed on that very question, and in deciding that the Building and Loan Commissioner—well, it wasn't the Building and Loan Commissioner, but anyway, the attorneys who did represent the defense in that case, which the Building and Loan Commissioner would normally have presented, they held that in that case, since there had to be a defense, the Building and Loan Commissioner had the duty of presenting the defense if he were not disqualified; that that being his duty, that therefore he should have a right to have his counsel compensated.

They cited the case of Dingwell versus Seymour, an old California case, to the same effect where there was an unsuccessful defense made. The court said—I think it was the court, or else it was in the brief, that if the custodian or a trustee was brought into court involuntarily and cannot be sure of being reimbursed for the expenses of his counsel, he wouldn't come in at all, because he couldn't afford to make a defense if he wasn't sure he was going to be compensated.

So in this case here, this is a case in equity that is found before the court, and it isn't a question whether the counsel for the public administrator have benefitted the fund, the public administrator has carried out his duty of trying to protect the fund, which is in his hands. It is his [47] duty to resist all assault in a court in a reasonable way on good grounds. That being his duty, he is entitled to a compensation for his attorneys, whom he selected to perform his duty for him in that regard.

Mr. Ruiz: In answer to that, the law of receivership, your Honor, in the State of California with respect to conservation of assets is to be distinguished from the law with respect to probate procedure. If the Court will read that case, the Court will see immediately there is a clear differentiation.

Mr. Trowbridge: Well, that is not so, I am sorry to say that bluntly, but there is a case by Judge Kaufman within the last year involving administrators, and the point is just the same, the public administrator is nothing but a custodian and receiver.

The Court: You have the advance sheet on that?

Mr. Trowbridge: The case that I have reference to was about a year ago. I can furnish the citation of the case by Judge Kaufman involving a probate proceeding, involving the administrator, yes. It would take a minute or two to find it. I don't have it with me, I don't know whether I have it handy or not, but it is named something like the Estate of Arota, something like that, but I know I read it recently.

The Court: I am prepared to sign your findings and judgment. That will then go back to the probate court, will [48] it not?

M. Ruiz: Yes, your Honor.

The Court: The probate court has a full opportunity to fix the fee?

Mr. Ruiz: Yes, your Honor.

The Court: In this case as well as the other cases?

Mr. Ruiz: Yes, that is correct.

The Court: I think that's the regular procedure, isn't that true?

Mr. Trowbridge: Well, I don't think in this particular case, your Honor, because as I say, it is going to penalize the other half of the estate for the services rendered here, and your Honor has this fund before him in this court, and the public administrator has been brought into this litigation by service of summons without desire to come in, but he has come in, of course, as is his duty, having been served. But I think that being so, this fund of this court should bear the expenses of the litigation pertaining to this fund.

The Court: Maybe the probate court will so determine.

Mr. Trowbridge: I don't think the probate court would have any jurisdiction, your Honor, to take any money out of Mrs. Sidebotham's half here.

The Court: Why not?

Mr. Trowbridge: Unless your judgment makes it clear to that effect. If your judgment has a paragraph in it that the [49] public administrator and the probate court may make an order affecting this half——

The Court: Any order that I may make will not interfere with your presenting, through the public administrator, the work and labor performed here, if I follow the law and understand it. So that I may be on safe grounds on that score, I would like to get you on the record if that isn't the law.

Mr. Ruiz: Yes, that is the law, your Honor.

The Court: In the event this is approved, this half of the property can be assessed for the proper costs.

Mr. Ruiz: That depends upon the arguments that are submitted by my worthy opponent, because of this fact: This judgment is going to be subject to interpretation. This judgment sets forth and is memorializing an obligation between the decedent and his former wife. The fact that it is a judgment only means it is again susceptible to further interpretation. This judgment will be susceptible to interpretation not only with respect to the matter at hand, but with respect to the matter to which reference has been made, with respect to the trust, the estate constituting trust property of some other people, whether the judgment in this case does or does not cut that off. This judgment will be susceptible to interpretation with respect to the United States Internal Revenue. We cannot project ourselves into [50] the future.

As I said before, this is ordinary. Oftentimes judgments are procured and then other judgments are procured, and it depends upon the ability and astuteness of counsel with respect to the interpretation and the law.

It is my interpretation, sir, of the law that the probate court at the present time has within its jurisdiction all of the corpus of the estate, and in due time will interpret the law and that it may interpret to the effect that Mrs. Sidebotham, out of her proportion, may be susceptible to a payment of attorneys' fees.

The Court: That would be my view.

Mr. Ruiz: And fees for the administrator.

The Court: So that you are not prejudiced by this motion, I am prepared to deny your motion without prejudice so that you may renew and have your day in court.

Mr. Trowbridge: The thing that we are con- about, your Honor, is that we may be faced hereafter with an argument, not necessarily by Mr. Ruiz, but by somebody else, maybe the federal government or some other claimant, that since your Honor has held that the property here in the estate was held as tenants in common by Mr. and Mrs. Sidebotham as far back as 1946, that the probate court has no right to deduct anything from her half interest for expenses of this litigation, including attorneys' fees, under the analogy of an express [51] trust. We will say that the public administrator is holding the property, half of the estate under an express trust for the benefit of Mrs. Sidebotham and that that express trust goes way back to 1946.

Now, if that argument is made by Mr. Ruiz or anybody else, it might be held by the probate court, or some other court, that the probate court has no jurisdiction to take anything out of her half interest. That's what we are afraid of. But if your Honor indicates, as you are now indicating, that it's your opinion and your intention that eventually whatever goes to Mrs. Sidebotham is to bear a fair proportion of the expenses of defending this case by the public administrator, including attor-

neys' fees, that certainly will be very helpful, if your Honor indicates that is your opinion and intention.

The Court: I think to stay within the law, and I could be mistaken in this, when this judgment is presented to the probate court I think they are legally in a position to recognize that you came into this court and that you haven't been compensated for the work and labor here. I think they are the ones to make the determination in fixing your fees.

Mr. Trowbridge: Well, that may be true as to fixing the fee, but equally important is the question which half of the estate will bear the fee, whether it should be Mrs. Sidebotham's half of the estate or—— [52]

The Court: It is for them to determine, the probate court to determine.

Mr. Trowbridge: We may end up by having further litigation in the form of a declaratory relief action or petition for instructions, or something of that sort, to find out who is going to bear the burden of the expense of the litigation.

The Court: Well, your motion will have to be denied without prejudice, and I am prepared to sign the findings and the judgment.

Mr. Trowbridge: May it please the Court, will there by a formal minute order denying attorneys' fees without prejudice?

The Court: Yes, sir.

Mr. Trowbridge: Thank you.

The Court: I did the best I could under difficul-

ties, gentlemen. Go forward, and I hope and trust right will finally prevail. I'm glad both of you are in good humor.

[Endorsed]: Filed August 9, 1956. [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplement to the record on appeal, as requested by counsel for the appellant:

Reporter's transcript of proceedings of February 27, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, 1956.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15123. In the United States Court of Appeals for the Ninth Circuit. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, et al., Appellants, vs. Helene Marceau Sidebotham, Appellee. Supplemental Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 10, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 411

HELENE MARCEAU SIDEBOTHAM,

Petitioner,

vs.

W. A. ROBISON, Administrator of Estate of Robert Sidebotham, deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

HELENE MARCEAU SIDEBOTHAM,

Petitioner,

vs.

W. A. ROBISON, Administrator of Estate of Robert Sidebotham, deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Helene Marceau Sidebotham petitions for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on April 2, 1957.

Citations to Opinions Below.

The official opinion of the Court below, Ninth Circuit Court of Appeals, is printed in the Appendix "B". The opinion on a prior appeal in a companion case involving the pleadings is reported in 216 F. 2d 816. This, however, is an historical antecedent and not essential for a determination of the case at bar.

Jurisdiction.

This case was removed to the Federal Court because of diversity of citizenship. (28 U. S. C., Sec. 1441.)

The date and time of entry of the Judgment sought to be reviewed is April 2, 1957. The order which denied appellant's petition for rehearing is dated July 25, 1957. This Court has jurisdiction to review the judgment under Rule 19(b).

Question Presented.

The question presented for review is whether a Federal Court, under the guise of *res judicata,* can give to a State Court of limited jurisdiction attributes of power which are withheld and denied said Court by State law, in violation and in irreconcilable conflict with the highest State Court ruling thereon, and whether in addition to constituting plain error, as a matter of law, in so doing it is likewise a departure from the accepted and usual course of judicial proceedings.

The Statutes Involved.

1. California Probate Code, Chapter XVII, entitled "Determination of Heirship," Section 1080.

2. California Probate Code, Chapter IV, entitled "Kindred not mentioned in will, who share in Estate," Section 108.

3. California Probate Code, Chapter XVI, entitled "Distribution and Discharge," Section 1000.

4. Fifth Amendment to United States Constitution.

Statement.

Petitioner originally filed a petition before the California State Probate Court under Section 1008 of the State Probate Code, to "determine heirship." *She alleged that she was not the widow of the decedent.* Thereafter she ascertained that the jurisdiction of said Court was limited in its authority and power to *a declaration of status* either as an heir to decedent, or a person in privity entitled to receive by distribution, whereupon she desisted from further pursuing her petition, and instead filed her claim under another theory and action in the California State Superior Court, of general jurisdiction, as a tenant in common and a stranger to decedent, and not as at first, in privity with his estate. Petitioner after trial on the merits in the United States District Court, successfully won valuable property rights held in co-tenancy against the estate of her former husband, on her claim that she was not his widow but a stranger to him, in that he *had died after she had first divorced him some years before.* [Tr. pp. 33-49, Opinion, Findings and Judgment, U. S. Dist. Ct.]

The Court below reversed the judgment of the United States District Court by giving the State Probate Court attributes of power prohibited by State Law. The Court below by use of the formula of *res judicata* has attempted to do indirectly that which it cannot do either under the Constitution of the United States or the laws of the State of California based on its opinion that at the time Petitioner filed her original claim of interest before the California State Probate Court, despite her allegations and the proof adduced that there was nevertheless no privity of status, that her property rights were determined adversely to her by the order of said Probate Court.

The power, authority and jurisdiction of the State Probate Court was clearly limited to a determination of whether Petitioner was in "privity" with the estate of decedent, *all of which subsidiary questions of property it could determine only upon an allegation or finding of the existence of privity or status.*

Petitioner, in her allegations of claim before said Probate Court, affirmatively stated that *she was not the widow of the decedent. That she had divorced him prior to his death. That decedent had died intestate. She therefore precluded the said Court from assuming jurisdiction of the subject matter as provided by State Law since she excluded herself from privity with said estate, in her petition.* She was not present in court as she had abandoned her claim which was barren of any jural relationship with the estate of decedent.

Reasons for Granting the Writ.

The Ninth Circuit Court of Appeals has rendered a decision in conflict with the applicable State Law, and departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, as follows:

> A federal court is precluded, in invoking *res judicata,* from reading into a state judgment, attributes of authority and jurisdiction in the State Probate Court which rendered it, which are denied to it by State Law. When State Law determines property rights, predicated upon "status," an allegation or finding of status is necessary to give it jurisdiction to render a judgment, otherwise the same is void, and *res judicata* cannot be invoked. To furnish a remedy where none existed and thereby render an unauthorized judgment is not within its Appellate Court jurisdiction and is irregular.

Thus, a decree of divorce and subsidiary property rights dependent on the same, must be predicated upon an allegation and finding of the status of "marriage." A judgment for failure to provide, and subsidiary property rights dependent on the same, must be predicated upon an allegation or finding of the status of "parent and child." A judgment for breach of contract and subsidiary property rights dependent upon the same, must be predicated upon an allegation or finding that a contract express or implied which creates the legal status of the parties, was entered into. An indispensable jural relationship is of necessity the foundation of all legal rights and limits of authority and power in the Courts, not the "prayer" of a claimant before a Court of limited jurisdiction.

In the case at bar the Court below invoked *res judicata* by holding that Petitioner's property rights had already been determined by a Probate Court which Probate Court had no jurisdiction to determine and wherein Petitioner neither alleged the jural relation of "privity" with the estate of decedent, nor did the State Court make a finding of such jural relation or privity with the estate, which had to exist as a basis to exercise jurisdiction. The decision rendered by the United States District Court in the case at bar (Appendix "C", pp. 19-26) and a prior appeal concerning the pleadings in the case at bar (216 F. 2d 816), from whence the Petitioner derives her property rights, is predicated upon the fact that Petitioner was a stranger with the Respondent's estate. *The jural relationship, the status in both action, i.e., the action before the Probate Court, and the action in the case at bar, were distinct, different, and irreconcilable and the Federal Court below cannot depart from the accepted and usual course of judicial proceedings and ex mero motu set itself in motion thereby to breath life and power into a*

State Court which is denied by State law, and independently thereof nevertheless redetermine a case on its merits, in excess of its own jurisdiction under the guise of res judicata.

A Federal Court May Not Vest Jurisdiction in a State Court Which Is Denied Said Court by State Law.

Where the law withholds jurisdiction, no power rests to confer it.

It was obvious to Petitioner that if she had originally proceeded in the Probate Division of the Superior Court, on her first petition "claiming adversely to the estate," that said Probate Court would have promptly dismissed the case as to her because she asserted in her petition that she was *not the widow of the decedent* and therefore barred from any relief under section 1080 which she had invoked. (Appendix B, opinion of Court below sets forth allegations of Petition.) It was obvious to Petitioner that she could not confer jurisdiction on the Probate Court, if it lacked jurisdiction (*Sampsell v. Superior Court*, 32 Cal. 2d 763, 766) to adjudge her status as a widow. She was not entitled to be heard on the merits, so she abandoned her abortive petition in the Probate Court as she had misconceived her rights and sued for relief to which she was not entitled. She pursued the same no further, and elected to proceed with the case at bar instead, upon a different theory of relief.

The jurisdiction of the Probate Court on her original petition was limited to the establishment of a status, *the status of an heir to decedent, or a person entitled to receive by distribution.* By her own allegations in said petition to the effect that she was not the widow of the decedent, Petitioner had precluded said Probate Court from

assuming jurisdiction of the "subject matter" since Petitioner excluded herself in privity by the said allegations of her petition. (*In re Van Deusen's Estate*, 30 Cal. 2d 285, 291.) A Federal Court, even though diversity of citizenship exist, cannot expand that which falls within original State Probate Court disposition. (*Sutton v. English*, 246 U. S. 199.) When a Probate Court in excess of its jurisdiction attempts to partition land, its decree cannot operate as *res judicata*. (*Logue v. Ferris*, 280 Fed. 707.)

A Probate Court does not adjudicate titles adverse to the decedent. (*Alexander v. Fid. Trust Co.*, 238 Fed. 938, reversed on other grounds in 243 Fed. 162; see *Bartleson v. Feidler*, 149 Fed. 30.)

An allegation of privity to and with the estate of the decedent was of the very essence of the subject matter which was indispensable to have given the State Probate Court jurisdiction of the subject matter, under California Probate Code, Section 1080.

Petitioner has no quarrel with the authorities noted by the Court below of and concerning *res adjudicata*, and Petitioner is in agreement with the correct statement of the law by Justice Fields, that a person is bound as "to every admissible matter which might have been presented" and upon "all matters involved in the issue which might have been litigated and decided in the case." Petitioner, as a stranger not in privity with the decedent, could not have offered evidence, nor would any offer have been admitted by the State Probate Court, to recognize her as a claimant entitled to distribution. Only a trial court of general jurisdiction upon a basis of lack of privity could exercise jurisdiction. It is not the function of an Appellate Court to assume powers of a trial court. (*Schilling v. Schwitzer*, 142 F. 2d 82.)

When Petitioner framed the issues on her misconceived petition before the Probate Court and affirmatively alleged that the decedent had died five years after her divorce from him which divorce was by a court of "competent jurisdiction," she simply failed to state a cause of action upon her petition for heirship and claim of interest. The California Probate Court had neither the power nor authority to render any judgment upon the merits wherein she alleged that she was a stranger because a cause of action had not been stated and its sole remaining function was to dismiss or deny her petition. *Nor can the Federal Court below vest jurisdiction in a State Court which is denied said Court by State Law.* Petitioner's claim before the State Probate Court, which she abandoned before trial could have been dismissed by mandate, or even by demurrer. Since Petitioner alleged that she was not the decedent's widow, no evidence was admissible to prove the contrary. Since she alleged she was not the decedent's widow, there were no issues available to her upon which she could litigate any claim to heirship or distribution. The fact that she claimed that certain community property had accumulated under a "former marriage" to the decedent, would not have authorized the Probate Court, or given power to the Court, to decide that she was entitled to the same, as decedent's heir, or as decedent's widow, since such a judgment would have been void, and a nullity, and therefore not *res adjudicata.*

The State Probate Court had neither the power nor authority to render a favorable judgment upon Petitioner's claim, so the sole remaining function of said State Court was to dismiss or deny her claim. The denial of the claim made by the Petitioner was a declaration which disposed of the proceedings and had no further force. It

did not on its face, and in its omnibus dismissal or denial purport to adjudicate title to property not dependent upon "heirship."

Hence, a decree of distribution, while conclusive as to heirship, is not binding as to title adverse to the estate, over which it has no jurisdiction. (*De Wolf v. De Wolf*, 175 N. W. 884.)

When the Limited Subject Matter of State Probate Court Jurisdiction and Controversy Is the Determination of Heirship, the Court Below Cannot Under the Guise of Res Judicata, Expand the Authority of Said State Court and by Usurping Powers Reserved Only to State Courts of General Jurisdiction Determine Property Rights.

The United States District Court tried the case, on its merits. Extensive briefs on the merits were filed before the Court below. Four months after oral argument and submission, the Court below rendered its decision, without any reference whatsoever to the merits of the case as set forth in the transcript and the briefs, "because there must be an end to litigation."

California Probate Code, Chapter XVII, entitled "Determination of Heirship," Section 1080, reads as follows:

> ". . . the executor or administrator, or any person claiming to be an 'heir' of the defendant or 'entitled to distribution of his estate or any part thereof may file a petition setting forth his claim . . . and praying that the court determine who are entitled to distribution of the estate."

The definition of an "heir" according to Section 108 of the California Probate Code, is one "who would be entitled to succeed to the property . . . . according to the provisions of Division II of this Code."

Persons who are entitled to distribution, are described in California Probate Code, Chapter XVI, as heir devisees, legatees, or the assignee, grantee, or successor in interest of any heirs, devisee or legatee.

A divorced wife is not included within the provisions of Division II of the California Probate Code or within the description of a person entitled to distribution of a decedent's estate.

Under this section regulating procedure for determination of heirship, a petitioner is not entitled to be heard unless he claims to be an heir, and when such claim is made, the court acquires jurisdiction to determine heirship and also the interest of each respective claimant to the estate.

In re Van Deusen's Estate (1947), 30 Cal. 2d 285, 285, 291, 182 P. 2d 565.

Probate proceedings are purely statutory and special in their nature, so that the Superior court, although a "court of general jurisdiction," is circumscribed in heirship proceedings by this chapter conferring jurisdiction and may not competently proceed in a manner essentially different from that provided by this chapter.

Bales v. Superior Court of Los Angeles County (1942), 21 Cal. 2d 17, 24, 129 P. 2d 685.

Where a petition to establish heirship has been filed and the notice prescribed by this section and 1200 has been given, the probate court has jurisdiction to proceed with the whole matter of heirship in the decedent's estate. It is a decree not *"in persona"* in favor of one party against another but only declares the status of a *res* to-wit: privity with the estate.

Lane v. Superior Court in and for Siskiyou County (1950), 98 Cal. App. 2d 165, 167, 219 P. 2d 497.

The Order and Judgment of the State Probate Court.

The order and judgment of the State Probate Court is as follows:

> ". . . . Ordered, Adjudged and Decreed by the court that Robert Russell Sidebotham, alias, died intestate on the 21st day of December, 1951, leaving surviving as his only heirs at law and the only persons entitled to distribution of said estate Robert E. Sidebotham and James J. Sidebotham, the sons of said decedent; that thereupon the estate of said decedent descended to his said heirs at law and is now vested in them, subject to administration, share and share alike, and each of said persons is entitled to distribution of one-half of said estate when said estate shall be in a condition to be closed.
>
> "It Is Further Ordered, Adjudged and Decreed that the petition of Helene Marceau Sidebotham be and the same is hereby denied." (Appendix B, Extract from Opinion of Court below.)

Petitioner had theretofore filed an alleged "Claim of Interest" in the Estate of Robert Sidebotham, deceased, before the Probate Division of the State Superior Court in San Francisco, which rendered the above judgment and order, in the manner set forth in point 2, in the opinion of the Court below [Clk. Tr. p. 267]. Thereafter, Petitioner realized that by virtue of the "subject matter" involved she was in the wrong court so she thereupon, on October 10, 1952, 26 days before December 4, 1952, which was the date the Probate Court heard the above matter, filed another action upon a different theory and a different remedy and other pleadings before the same Superior Court, but not in probate, which pleadings were thereafter served upon Respondents prior to the probate hearing. Said second action is the case at bar on appeal, which was removed from the State Court, to the United States District Court for trial.

When on December 10, 1953, a Judge of the Superior Court signed a "decree establishing heirship" upon said petition of Petitioner, her petition in said Probate Court was obviously denied because she was not an "heir." Neither Petitioner nor her counsel were present in court at the time of the alleged hearing. No evidence was introduced. As pointed out in the opinion of the Court below [Tr. p. 268, *infra*], Petitioner appeared by "her petition" only, which was a "writing" which contained certain legal conclusions, and a prayer that it be determined that all of the property belonged to her by distribution as survivor. Said petition asserted that her marriage to the decedent had been "dissolved by a court of competent jurisdiction." It stated therein that the decedent had "died intestate during the month of December 1951," and further stated that Petitioner and the decedent were divorced on "November 14, 1946" which was five years before the decedent died. (Appendix B, contains extracts of Petition.)

The opinion or decision of said Probate Court appears in the opinion of the Court below.

Said opinion decided only one thing, to-wit: That the decedent only had two heirs, entitled to distribution, i.e., his sons. When said Probate Court adjudged that the two sons of the decedent were his only heirs, UPON THE PETITION OR CLAIM OF INTEREST *filed by the Petitioner it also adjudicated of necessity, that the Petitioner was not the heir of the decedent. Said Probate Court opinion went no further than to establish heirship, and its judgment is res adjudicata not as to the proposition as set forth by the United States Court of Appeals, but to the contrary that Petitioner was not an heir* BUT A STRANGER TO THE ESTATE. Said conclusion consistent with the position taken by the Petitioner in the case at bar and instead of barring her claim, fortifies the same.

The concluding portion of the opinion of said State Probate Court in the form of an omnibus denial that the "petition of Helene Marceau Sidebotham be and the same is hereby denied" in and of itself added nothing to the actual opinion of the State Probate Court in the paragraph which preceded the same.

Thus, in the case of *Becket v. Selover*, 7 Cal. 215, it was stated that probate sales and proceedings were void, because the Court had no jurisdiction to grant letters on the estate of a living person. The fact that the petitioner mistakenly alleged that a living person was dead, could not confer jurisdiction. In the case at bar the defect of jurisdiction appeared on the face of appellant's petition before the said State Probate Court and it affirmatively appeared that she was not in privity with said estate.

Conclusion.

In conclusion, petition for writ of certiorari should be granted because the federal court below cannot read into a state probate court judgment, attributes of powers and jurisdiction which are specifically denied said court by State law, and by said contrivance conclude that petitioner's property rights as a stranger to the estate of the decedent were thereby determined, and that said state court judgment is now *res adjudicata* on the merits, in violation of the Fifth Amendment to the Constitution of the United States, since it is not within the power of a federal appellate tribunal to redetermine a State Court adjudication, which upon its face obviously is not adverse to Petitioner, and thereby deprive petitioner of property rights, without due process of law.

Respectfully submitted,

MANUEL RUIZ, JR.,

Attorney for Petitioner.

APPENDIX "A".

Statutory Provisions Cited and Quoted.

DETERMINATION OF HEIRSHIP.

1080. Procedure: Petition, etc. When the time to file or present claims against the estate has expired, and a petition for final distribution has not been filed, the executor or administrator, or any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution of the estate. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code. At least 10 days before the date set for the hearing of such petition by the court, the petitioner shall cause notice of the hearing thereof to be mailed to the executor or administrator and to all legatees and devisees and to all known heirs of the decedent, and to all persons (or their attorneys, if they have appeared by attorney) who have requested notice as provided in Section 1202 of this code, or who have given notice of appearance in person or by attorney, addressed to them at their respective post-office addresses given in their requests for special notice or notice of appearance, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such persons. Any person may appear and file a written statement setting forth his interest in the estate. No other pleadings are necessary and the allegations of each claimant shall be deemed to be denied by each of the other claimants to the extent that they conflict with any claim of the latter.

INTERPRETATION OF WILLS.

108. Disposition to heirs, etc.: Words of Donation. A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," "personal representatives," "family," "nearest (or next) of kin" of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of Division II of this code. Such terms are used as words of donation, and not of limitation when the property is given to the person so designated, directly and not as a qualification of an estate given to the ancestor of such person.

1000. Petition and Notice of Hearing. When four months have elapsed after the first publication of notice to creditors and upon bond . . . the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court for distribution of a legacy, devise or share of the estate or any portion or portions thereof to which he is entitled or a payment on account of the legacies to the heirs, devisees or legatees or any assignees, grantees or successors in interest or where there are priorities, to those of the class or classes having priorities . . .

Amendments to the United States Constitution.

Amendment V.

Criminal Proceedings and Condemnation of Property.

(Section 1). No person shall be held to answer for a capital, or otherwise infamous crime, unless . . .; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B.

Opinion Below [Tr. p. 266].

United States Court of Appeals for the Ninth Circuit.

Before Healy, Pope, and Lemmon, Circuit Judges.

Lemmon, Circuit Judge.

"Because there must be an end to litigation, the legal principle of res judicata is a salutary one and should be freely applied," says the successful litigant.

"Yes, but—", replies his adversary, "yes, but *our* case is different. As to *us*, *res judicata* should not be invoked because," etc., etc.

Debates of this type have been going on for centuries. In a towering milestone in the law of *res judicata*, a California jurist who attained a place on the United States Supreme Court, gave a masterly elucidation of the principle. We refer to Mr. Justice Field's opinion in Cromwell v. County of Sac, 1877, 94 U. S. 351, 352-353, which is to be quoted from hereinafter.

1. *Statement of the Case*

This is the second appeal in the instant case. With the exception of two crucial pleadings and a crucial prior decree, the relevant record in this case will not be summarized herein, since it is amply stated in our first opinion, published *sub nom.*, Sidebotham v. Robison, 9 Cir. 1954, 216 F. 2d 816. The three vital documents will be fully summarized hereinafter.

2. *The Appellee's Statement of "Claim of Interest" in the Estate of Sidebotham Filed in San Francisco On December 4, 1952.*

In the Superior Court of the State of California, for the City and County of San Francisco, on December 4,

1952, the present appellee filed what she captioned a "State [sic] of Claim of Interest in Estate Pursuant to Probate Code 1080" "In the Matter of the Estate of Robert Russell Sidebotham, Deceased." The document, signed by the appellee's attorney on this appeal, contained the following material allegations:

The statement set forth the appellee's "interest in the estate" of Sidebotham, who died intestate during the month of December, 1951. Phil C. Katz was appointed administrator of the estate.

The only heirs of the decedent, other than the petitioner, are Robert Sidebotham and James Sidebotham [the present appellants], by a former marriage of the decedent.

The estate consists of community property only, as well as increase thereof, all of which constitutes property of petitioner (appellee), by virtue of the following facts:

a. Appellee and decedent were married in Tijuana, Lower California, Mexico, on May 30, 1928, and were husband and wife up to and including November 14, 1946, on which latter date "said marriage was dissolved by a Court of competent jurisdiction."

b. The matrimonial domicile of the appellee and the decedent was at all times the State of California.

c. During the marriage the decedent accumulated real and personal property, consisting of more than $75,000 in cash, on deposit in banks in California; and real estate and other properties.

The appellee's petition concluded with the following paragraphs:

> "That said *community* property, has never been partitioned either by agreement of petition [sic] and decedent, judicial decision, or otherwise; and upon the

death of decedent, petitioner became entitled to receive one-half thereof by survivorship, and detain the other half thereof, which she at all times has owned from the moment of its acquisition during the marriage.

"WHEREFORE, petitioner prays that the Court determine that she is entitled to said property of said estate above set forth and that a judgment and decree of the Court be made accordingly." [Emphasis supplied.] [Deft. Ex. A.]

It is agreed that the above petition was filed in "the probate jurisdiction of the Superior Court," "the probate division of the Superior Court," or "the superior court acting in the exercise of its probate jurisdiction," as it is variously phrased. See Schlyen v. Schlyen, 1954, 43 C. 2d 361, 372.

3. *The "Decree Establishing Heirship"*

On December 10, 1953, a Judge of the Superior Court in San Francisco signed a "Decree Establishing Heirship." The decree recited that the petition of Robert E. Sidebotham and James J. Sidebotham, praying that the court determine who were entitled to distribution of the estate of Robert Russell Sidebotham, deceased, had come up for hearing; that satisfactory proof of notice had been given; that the two above-mentioned petitioners had appeared by their attorney and had filed their written statement setting forth their respective claims of interest in the estate, "and that Helene Marceau Sidebotham also appeared by her petition filed herein on the 4th day of December, 1952; and that the Court proceeded to hear "the petitions of both Robert E. Sidebotham and James J. Sidebotham and of Helene Marceau Sidebotham."

After a hearing of the evidence and the arguments of counsel, it was—

". . . ORDERED, ADJUDGED AND DECREED by the court that Robert Russell Sidebotham, alias, died intestate on the 21st day of December, 1951, leaving surviving as his only heirs at law *and the only persons entitled to distribution of said estate Robert E. Sidebotham and James J. Sidebotham, the sons of said decedent;* that thereupon the estate of said decedent descended to his said heirs at law *and is now vested in them,* subject to administration, share and share alike, *and each of said persons is entitled to distribution of one-half of said estate* when said estate shall be in a condition to be closed.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED *that the petition of Helene Marceau Sidebotham be and the same is hereby denied."* [Emphasis supplied.]

Our earlier opinion in this case was handed down on October 18, 1954. Neither of the above exhibits was mentioned in that opinion, of course, since they first came into the case when they were put into evidence in the Court below at the trial on the facts, which was held on October 24, 1955.

4. *The Third Amended Complaint in the Instant Case*

The third—and last—amended complaint in this case was entitled an action to "Quiet Title Accounting and Injunction." It incorporated "paragraphs I to VII, inclusive, of her first cause of action, as contained in her second amended complaint to quiet title, accounting and injunction," and "paragraphs I and II of her second cause of action" in the same second amended complaint. Those two

causes of action are thus summarized in our first opinion, 216 F. 2d at page 821:

> "In her seconded amended complaint, appellant alleged in the first cause of action that on the death of Robert Sidebotham on December 21, 1951, she and he were tenants in common of certain real and personal property, each being the owner of an undivided one-half of the property, that the administrator has repudiated the co-tenancy and refused to her the right of possession and beneficial enjoyment of her share as well as the right to an accounting as to the rents and profits pertaining to the property. She stated the capacity of Katz as Administrator of the Estate and the defendants Robert Sidebotham and James Sidebotham as claiming the Estate as the heirs at law.
>
> "In the second cause of action which incorporated the allegations of the first, she averred that she was, at the times mentioned, the owner and entitled to the possession of an undivided 50% of the assets, property, both real and personal, as well as the fruits and increase thereof, which the decedent possessed at the time of his demise."

In addition to the above two causes of action, transplanted as two separate causes of action from the second into the third amended complaint, the third amended complaint contains a third cause of action. Although that third cause of action is fully summarized in our first opinion, for the convenience of the reader we give a summary here, as follows:

Since the death of Robert Sidebotham, on December 21, 1951, the appellee, as an aggrieved party, has discovered the following facts constituting fraud against her,

which fraud proximately caused her to "suffer a grievous mistake, from which she desires relief."

The appellee was married to Robert Sidebotham on January 1, 1927, and was divorced from him on November 14, 1946, in Nevada, by substituted service.

During 1938, when Sidebotham was sentenced to jail for failure to report a real estate subdividing scheme to the State Real Estate Commission, he borrowed $100 from the appellee, and told her that as soon as he made some money he would pay her back. He frequently saw the appellee until the middle of 1940, always informed her that he was "broke," but occasionally would give her rent and food money, never paid her back the $100, and never informed her that "he had made any money."

At the time of his death, "certain assets were found in his possession, under the following aliases . . . . and several combinations of the name of Sidebotham." Those assets passed from the decedent's control to Phil C. Katz, as his personal representative, "and to the present successor of said representative, towit: [the appellant Robison]."

That one of the reasons of the decedent "in so hiding his assets was to prevent [the appellee] from sharing in acquests and gains during her marriage to him," etc.

In 1941 the "decedent refused to further cohabit with plaintiff," etc., "and she did not know his whereabouts." In November, 1946, the appellee procured a divorce from him on substituted service.

"When questioned by her attorney, whether there was any community property, she answered that she did not know. That said attorney, unbeknownst to [appellee], nevertheless framed a formal pleading, wherein it was

stated that there was no community property. That plaintiff did not read the same but at the hearing of the action, wherein a divorce was granted to [appellee], she did not testify concerning the existence or non-existence of property of the marriage."

The Nevada court did not dispose of the property rights of the parties, etc., and there was no evidence submitted to the Court concerning property, but the court nevertheless found that the allegations of the complaint were true and sustained by the evidence. ". . . the finding aforesaid was arbitrary and capricious, and the Court lacked the power . . . accordingly to make the same, since there was no evidence submitted on the subject whatsoever."

The appellee seeks relief from her mistake and the estoppel that would otherwise apply, but for said mistake, "in that an adjudication that there was no community property, under the facts hereinabove set forth, would result in great and irreparable damage, etc. . . . the presumption of law . . . that Robert Sidebotham admitted all of the facts which were pleaded in the Nevada Judgment, by reason of lack of personal service upon him, is a fiction which this Court of Equity ought to weigh against the misconduct of Robert Sidebotham in having actively concealed assets," etc., to which the appellee had an equal and vested interest with him. . . . [the appellee] first discovered that she had signed the formal pleading containing the sentence that there was no community property, . . . after the institution of this case at bar, when her attorney, Manuel Ruiz, Jr., informed her of the same, on July 13, 1953, said attorney having been on the same day so advised by the attorneys for the defendants [appellants herein]."

The prayer asked for a "writ of mandamus or mandatory injunction, or other proper order" "requiring [ap-

pellants] . . . to account for all monies, [etc.] in their possession, held for . . . the account of the Estate of Robert Sidebotham, etc., . . . and that they . . . be restrained from paying out further funds, etc., to third parties."

The prayer also asked for an accounting and for a decree declaring that the appellants "have no interest" in the assets in question, "and the assets accounted for to the extent of an undivided one-half thereof."

The appellee also asked that she be relieved "from any estoppel or mistake proximately resulting from the fraudulent conduct of concealment of said Robert Sidebotham concerning her property rights."

Finally, the prayer requested "That it be decreed that [*appellee*] *is the owner and entitled to the possession of an undivided half of the assets, etc., constituting the Estate of Robert Sidebotham, deceased.*" [Emphasis supplied.]

On February 23, 1955, the appellee amended her Third Amended Complaint by alleging that she was married to Sidebotham in Tijuana, Lower California, Mexico, on May 30, 1928. In her original Third Amended Complaint, it will be remembered, she had alleged that she was married to him on January 1, 1927.

5. *The "Decree Establishing Heirship" Is Res Judicata in the Instant Case.*

We have fully summarized the "Decree Establishing Heirship," rendered by the Superior Court of the City and County of San Francisco. We have also given ample synopses of the appellee's statement of "Claim of Interest" filed in that Court, and of her Third Amended Complaint in its First Amendment filed in the Court below.

We have seen that in her San Francisco claim of 1952 the appellee asserted that she was entitled to retain the other half-interest "which she at all times has owned from the moment of its acquisition during the marriage."

In her present suit, she avers that her deceased ex-husband hid his assets so as to prevent her from "sharing in acquests and gains during her marriage to him"; that when questioned by her attorney in the Nevada divorce suit as to whether there was any community property, "she answered that she did not know"; and that she "seeks relief from her mistake," "in that an adjudication that there was no community property, under the facts hereinabove set forth, would result in great and irreparable damage," etc. She asks that she be decreed the owner "of an undivided half of the assets" of the estate.

But the San Francisco decree filed on December 14, 1953, and signed by the Judge of the Superior Court four days previously, denied her petition *in toto*, in which she claimed all of the community estate, half as owner "from the moment of its acquisition during the marriage" and the other half "by survivorship."

Since her 1952 petition, in which she claimed *all* of the community estate was *wholly* denied, she cannot now relitigate a claim for *one-half* or any other part thereof. Just as she originally could not have sued piecemeal for her alleged share of the Sidebotham estate, so can she not sue *now* for a piece of it, her former total claim having been already judicially denied.

In Cromwell v. County of Sac, *supra*, 94 U. S. at pages 352-353 Mr. Justice Field said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment

as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, *"not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example: a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment.* If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. *The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever."* [Emphasis supplied.]

If it be argued that the "Decree Establishing Heirship" purported to adjudicate the rights only of Robert E. Sidebotham, James J. Sidebotham, and Helene Marceau Sidebotham in the estate of Robert Russell Sidebotham, while in the present suit, W. A. Robison, the administrator of the decedent's estate, has been made a party defendant, there is an answer both simple and conclusive.

The administrator is not a necessary party to the instant suit, and therefore his presence in the case cannot defeat the application of the doctrine of *res judicata*.

In Sullivan v. Curry, DC Ariz., 1930, 40 F. 2d 948, 950, appeal dismissed, 9 Cir., 1930, 44 F. 2d 1020, the Court said:

> "In the case of Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667, 669, which is similar to the case at bar, and in which an executor was joined as a party defendant, the Supreme Court of California held: 'The executor is not a necessary party to the action. All the devisees, legatees, and persons claiming an interest in the estate are made parties plaintiff and defendant, and, as the executor has no interest in the distribution of the estate, he is properly excluded from a contest over the right of distribution of the whole or a part of it'—citing [many cases]."

And in Sunshine Coal Co. v. Adkins, 1940, 310 U. S. 381, 402, not cited by counsel, the Court said:

> "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in Chicago R. I. & P. Ry. Co. v. Schendel, 270 U. S. 611, 620, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally dif-

ferent may be, in legal effect, the same.' A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them [citing Cromwell v. County of Sac, *supra.*]"[1]

The principle of *res judicata* has been repeatedly applied to probate and other matters by the Supreme Court of California.

In the leading case of Crew v. Pratt, 1897, 119 C. 139, 148, 149, the Court said:

"Law-writers and courts, in treating of jurisdiction, have usually contented themselves with saying that, where courts have jurisdiction of the person and of the subject matter of the controversy, their judgments, if erroneous, are voidable, but not void. That is to say, they are open to direct attack as upon appeal, but not to collateral attack.

"In thus defining jurisdiction of the subject matter, it must be understood that the power to pronounce the resulting judgment constitutes a part of the subject matter over which the jurisdiction extends.

* * *

"It may be stated, as a general proposition, that a judgment is conclusive, not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided. [Authorities cited.]

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[1]See also United States v. Des Moines Valley R. Co., 8 Cir., 1897, 84 F. 40, 44-45.

"In Auguisola v. Arnaz, 51 Cal. 435, it was said *probate courts have exclusive jurisdiction of the final distribution of the estates of decedents.*

"And such decree of distribution of an estate, after due notice by the probate court, is conclusive upon a person who might have claimed that a share of the estate belonged to him." [Cases cited.] [Emphasis supplied.][2]

6. *The California Probate Court Had Jurisdiction to Try the Appellee's Title to Property of the Estate.*

The appellee asserts that the Probate Court was "without jurisdiction to try title to property as between a representative of the estate and a stranger thereto."

The rule relied upon by the appellee is well settled in California,[3] but simply is not applicable to the case at bar. A woman who claims an "interest in the estate," who refers to herself as one of the "heirs," and who alleges that she is "entitled to receive one-half" of the estate, which "consists of community property only," "by survivorship," and to "retain" the other one-half as the community spouse, can hardly be said to be claiming as a "stranger to the estate." When we consider *jurisdiction*, we are not concerned with the *justice* of the petition, but with its *claims*.

Under California law, "upon the death of either spouse, one-half of the community property belongs to the sur-

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[2]See also Reynolds v. Churchill Company, 1921, 187 C. 543, 546-547; Sacramento, etc., Drainage District v. Superior Court, 1925, 196 C. 414, 430; Kupfer v. Brawner, 1942, 19 C. 2d 562, 564; Estate of Loring, 1946, 29 C. 2d 423, 427-428; 21 Cal. Jur. 2d §861, page 244.

[3]See Estate of Dabney, 1951, 37 C. 2d 672, 676-677; Schlyen v. Schlyen, *supra*, 43 C. 2d at page 372; but *cf.* Estate of Riccomi, 185 C. 458, 463-464.

vivor and the other half is subject to the testamentary disposition of the decedent. In the absence thereof it goes to the survivor, subject to certain provisions relating to administration of estates, including control and disposition of community property by the husband upon the death of the wife, . . ." 10 Cal. Jur. 2d, §62, page 737.

A commentator in The Stanford Law Review of April, 1952, Volume 4, Number 3, page 443, in discussing "the wife's interest in the community property prior to the husband's death," observed:

> "Of even greater persuasiveness is the fact that the California legislature has regarded the wife as having such an interest in community property that the entire estate should not be subjected to the California inheritance tax."[4]

Assuredly, this is not language applicable to "a stranger to the estate"!

7. "Allowance of Expenses of Defense"

A supplemental transcript of record and an "Opening Brief of Appellants" have been filed on the "Allowance of Expenses of Defense." In the latter, the appellant Robison asks that he "be awarded all his necessary expenses incurred to defend any assets in his possession," etc.

Robison concedes, however, that "If the judgment is reversed and defendant W. A. Robison as said administrator wins a final judgment in the federal District Court no problem as to the awarding of expenses of defense will ever arise in that Court or in this Court because they will be awarded out of the probate assets being adminis-

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[4]See also California's Probate Code §§201, 201.5, and 202; and California's Revenue and Taxation Code, §13551.

tered by the San Francisco Probate Court." In view of the appellant's concession and in view of the fact that we are deciding his appeal in his favor, there is no need for us to pass upon the question raised by the appellant.

8. *Conclusion*

We hold that the Probate side of the Superior Court of the City and County of San Francisco had jurisdiction to try the appellee's title to the property in her former husband's estate, and the "Decree" of that Court "Establishing Heirship" is *res judicata* in the instant case.

Accordingly, the judgment of the Court below, undertaking to find in favor of the appellee on an issue that had already been adjudicated by the State court—namely, the appellee's rights in Robert Sidebotham's estate— is

Reversed.

(Endorsed:) Opinion. Filed Apr. 2, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "C".

Conflicting Opinion.

EXTRACT FROM MEMORANDUM OPINION [Tr. p. 39].

(4) The Effect of the Decree Under Section 1080 of the Probate Code.

The defendants contend, in effect, that plaintiff's claim has already been adjudicated because she filed a petition for determination of heirship in the Probate Court, and allowed a default to be taken against her.

The record indicates that plaintiff was not sure of the state court's jurisdiction, and that she filed two matters at about the same time. One of the matters was in the Probate Court, and the other was the action now before this court.

The plaintiff contends that after she filed in the Probate Court, she withdrew because of the fact that she was not in privity with the estate, and accordingly said court was wtihout jurisdiction of the subject matter of her claim. In the instant case the plaintiff was not decedent's widow, and at the time of his death was a stranger to the estate. The law of California states that the Probate Court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate. Estate of King (1926), 199 Cal. 113. The court's holding in the case of Schylen v. Schylen, 43 Cal. 2d 361, has not changed this general rule. That case decided that matters which the State Superior Court acting in the exercise of its probate jurisdiction may try, can nevertheless be tried in the Superior Court by virtue of its general jurisdiction, by waiver of the parties, but that matters which must be tried in the Superior Court in its general jurisdiction, such

as claims of title between the estate and strangers cannot be tried in the Probate Court since the Probate Court is without jurisdiction.

Quoting from page 373 of said opinion:

"It is certainly true that the court in a probate proceeding is concerned with the settlement of the estate and not with controversies between the estate and strangers, the adjudication of which is the function of the court in the exercise of its general jurisdiction."

The Probate Court did not have jurisdiction to hear plaintiff's claim and therefore she is not precluded from proceeding herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [Tr. p. 42].

The above-entitled action having been heard by the Court without a jury and evidence, both oral and documentary having been presented and the matter duly submitted, the Court now makes the following findings:

Findings of Fact

1. That Robert Sidebotham died intestate on December 21, 1951. At the time of his death he was in possession and control of the property specified in Inventory and Appraisal filed in probate proceedings, case No. 123669, California Superior Court, City and County of San Francisco, in re: Estate of Robert Sidebotham, deceased, inclusive of the following, to wit: Contents of Safety Deposit Box, at the American Trust Company, in San Francisco, containing the sum of $64,770.00; postal certificate No. 9095, $2,500.00; twenty 25-cent War Savings Stamps, $5.00; stock sold prior to death, $400.00; Bank of America (Day & Night), $1,867.00; Bank of America (6th

and Olive), $1,120.79; Bank of America (Arguello and Geary), $2,524.75; Merrill Lynch, Pierce, Fenner & Beane, brokerage account, $792.10; Pacific National Bank, $525.79; U. S. Postal Savings, $560.12; Anglo-California National Bank, $433.24; Eureka Federal Savings and Loan Association, $4,217.56; 1949 Lincoln Sedan, Engine No. 13 A7094, $1,420.00; Real Estate in the City and County of San Francisco, described: Beginning at a point on the N. line of Geary Blvd., distant thereon 100 feet westerly from the westerly line of 14th Avenue; running thence westerly along the northerly line of Geary Blvd. 27 feet, 6 inches, thence at a right angle easterly 27 feet, 6 inches; and thence at a right angle southerly 100 feet to the point of the beginning, being a portion of block 1446, lot number 25, improved, $30,000.00; six shares of the capital stock of El Vado Corporation, Nevada corporation, Certificate No. 19, dated July 5, 1935. Two Thousand shares of the capital stock of Inter-Provincial Oils, Ltd., Dominion of Canada, Certificate No. 5766, dated July 21, 1931. Five Hundred shares of the capital stock of Crescent City Properties Company, Nevada corporation, Certificate No. 14, dated April 23, 1928, 250 shares, and Number 15, dated April 23, 1928, 250 shares. That said property was held, kept and controlled by him, under various and sundry names and aliases.

2. That said property, upon the death of Robert Sidebotham, passed from the control, possession and management of said decedent, to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit: W. L. Robison, the duly qualified and acting administrator of the Estate of Robert Sidebotham, Deceased, being one of the defendants in the action.

3. That the plaintiff, Helen Marceau Sidebotham, and said decedent, Robert Sidebotham, were married in the

City of Tijuana, Lower California, Mexico, on May 30, 1928, and remained husband and wife until she divorced Robert Sidebotham on November 14, 1946, in the State of Nevada, by substituted service. That although said judgment of divorce found the allegations of the complaint to be true, one of which allegations was that there was no community property, plaintiff was not aware that the same was in her complaint, she was not questioned at the trial about any community property, and the decree made no adjudication of property rights. That the plaintiff first discovered that her complaint in the Nevada action made reference to the fact that there was no community property on or about July 13, 1953. That the property involved in the case at bar was located outside of the State of Nevada, and the jurisdiction of that State Court.

4. That the decedent at all times concealed from the plaintiff the fact that he had accumulated property during the marriage, which belonged to the community. She was at all times ignorant concerning the extent thereof, nor was she put on inquiry concerning any circumstances known to her, nor did she until after the death of Robert Sidebotham, on December 12, 1951, discover facts constituting the existence of said property and of the said fraud against her.

5. That said property, excepting the sum of $10,015.06, was acquired prior to November 14, 1946, by the decedent, and all of his estate was acquired or accumulated during the marriage relationship of the parties, inclusive of the period of time between the years 1935 and 1946, during which time the decedent was busy in negotiating deals pertaining to real estate transactions and oil royalties, in which he had an interest, and which numbered approximately seventy in number. That on November 14,

1946, by virtue of the divorce between the parties, plaintiff and said decedent became, and ever since have been, tenants in common of said property, save and except said sum of $10,105.06 thereof.

6. That the decedent procured a judgment of divorce against plaintiff in the State of Wyoming on October 2, 1940. That said judgment was upon substituted service. That when the decedent procured said divorce in Wyoming, he stated upon his oath, that the residence of the plaintiff was "unknown and cannot, with reasonable diligence be ascertained." That said decedent did in fact know where the plaintiff resided, prior thereto in the year 1940, in the City of San Francisco, where he visited her, cohabited with her, and paid her rent in said year 1940. That said judgment did not purport to dispose of any property rights. That it is subject to collateral attack, in that it was obtained by false statements in the affidavit made by decedent to obtain the order of publication of summons. That said decree was void. That in 1940 the matrimonial domicile of the parties was the State of California. That plaintiff was a resident of California, did not participate in the Wyoming proceedings, nor did she make a personal appearance therein.

7. That at the time of decedent's death, the plaintiff was not decedent's widow, but she was a stranger to the estate. That she filed a claim to the property rights asserted herein under Section 1880 of the Probate Code of the State of California in the Estate Probate proceedings in the Superior Court of the State of California, in San Francisco, but did not pursue the claim further and allowed a default to be taken against her. She did so because of the fact that she was not in privity with the estate, and on the basis that the said probate court had no jurisdiction

of the subject matter of her claim. It is found that the probate court aforesaid had no jurisdiction.

8. The defendants, Robert Sidebotham and James Sidebotham, are sons of decedent, by a prior marriage, and are entitled to take as heirs at law, and as their rights may be determined under the laws of succession of the State of California, as to the property left by decedent, not otherwise disposed of in favor of the plaintiff by this judgment.

Conclusions of Law.

1. That all of the monies, assets, and properties possessed and controlled by the decedent at the time of his death on December 21, 1951, and held for and on account of the Estate of Robert Sidebotham, deceased, excepting the sum of $10,015.06 thereof, were acquired and accumulated by said decedent, prior to November 14, 1946.

2. That plaintiff has at all times since November 14, 1946, been the owner and entitled to the possession of an undivided one-half thereof as tenant in common.

3. Defendants are ordered to account to the plaintiff for all such monies, assets and properties held for and to the account of the Estate of Robert Sidebotham, Deceased.

Let Judgment Be Entered Accordingly in Favor of the Plaintiff and Against Defendants, and Each of Them; Each of the Parties to Bear His or Its Own Costs Incurred Herein.

Dated: January 27th, 1956.

/s/ MICHAEL J. ROCHE,
Judge of the United States District Court.

JUDGMENT [Tr. p. 48].

In the United States District Court for the Northern District of California, Southern Division.

Helen Marceau Sidebotham, Plaintiff, vs. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, *et al.*, Defendants. No. 32531.

This cause came on regularly for trial before the Court sitting without a jury, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff have and recover judgment against the defendants' W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased; and James Sidebotham and Robert Sidebotham.

The defendant, W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased; and James Sidebotham and Robert Sidebotham, are hereby ordered to account to plaintiff Helen Marceau Sidebotham, for all monies, assets, and properties, which have been held for and to the account of the Estate of Robert Sidebotham, deceased.

It is further ordered that defendant W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased, pay out of the funds of said estate, in due course of administration, to plaintiff Helen Marceau Sidebotham,

an undivided one-half of all the monies, assets, and properties, possessed and controlled by the decedent, at the time of his death on December 21, 1951, after first deducting therefrom, the sum of Ten Thousand Fifteen Dollars and Six ($10,015.06) Cents.

Each of the parties shall bear his or its own costs.

Dated January 27, 1956.

/s/ MICHAEL J. ROCHE,
Judge of the United States District Court.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 411

HELENE MARCEAU SIDEBOTHAM,
Petitioner;

vs.

W. A. ROBISON, Administrator of Estate of Robert Sidebotham, deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI.

DELGER TROWBRIDGE,
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Attorney for Respondents Robert Sidebotham and James Sidebotham.

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REPLY TO PETITION FOR A WRIT OF CERTIORARI.

Petitioner on pages 3 and 4 of her petition, under the heading of "Statement", openly admits that she played fast and loose with a state Court.

The "Statement" on page 3 begins by saying:

> "Petitioner originally filed a petition before the California State Probate Court,"

and on the next page (4) the petitioner says (referring to herself)

> "*She therefore precluded* the said court from assuming jurisdiction of the subject matter." (All italics ours.)

By this affirmative action she caused the Court to proceed and render a solemn judgment, and she cannot now repudiate the judgment which would do a grave injury to the respondents.

Aside from the obvious *estoppel* against petitioner she *repeatedly* tries to mislead this Court by her statements that the Probate Court of California was a Court of "limited jurisdiction" (page 3 of petition) and not a Court of general jurisdiction. This is the entire basis of her petition as she herself says.

The notion that the probate division of the Superior Court of California is not a Court of "general jurisdiction" has long since been exploded.

In the leading California Supreme Court case of *Schlyen v. Schlyen*, 43 Cal. (2d) 361 at 375 (1954), the Court, per Shenk, J. said as follows:

> "*Notwithstanding the abolition of 'Probate Courts' as such by the Constitution of 1879 this court continued thereafter to refer to the superior court sitting in probate as the 'probate court' thus implying at least that it is a separate and distinct court of the state, which it is not.* Such a reference has been employed by the reviewing courts of this state in cases too numerous to mention and *is, of course, inaccurate.* But no harm is done where it is understood that such

reference is to the superior court sitting in the exercise of its probate jurisdiction. It may then be considered to be no more than a convenient way of conveying the idea of *the court exercising a particular function.* Such expressions are colloquially used when reference is often made to the 'Domestic Relations Court,' the 'Divorce Court,' the 'Criminal Court,' the 'Traffic Court,' and so on. But *such expressions do not of course give those courts official status as separate courts* and it should be so understood."

Other cases to the same effect, going back as far as 1894, are:

In re Thompson's Estate, 101 Cal. 349, 353 (1894);

Wells Guardianship, 140 Cal. 349, 352 (1903);

Estate of Riccomi, 185 Cal. 458, 463 (1921);

Medeiros v. Cotta, 130 C.A. (2d) 740, 746 (1955);

Medeiros v. Silva, 132 C.A. (2d) 771, 775 (1955);

Medeiros v. Medeiros, 138 C.A. (2d) 194, 198 (1955).

Even assuming that the petition in the probate division of the Superior Court had to allege some fact showing privity with the estate of the decedent, we find such allegation in the following statement in her petition for determination of heirship under sec. 1080 of the Probate Code of California:

"That said community property, has never been partitioned, either by agreement of petitioner

and decedent, judicial decision, or otherwise; and upon the death of decedent, petitioner became entitled to receive one-half thereof *by survivorship,* and *retain the other half thereof,* which she at all times has owned from the moment of its acquisition during the marriage." (Record p. 63.)

While petitioner did not allege that she was entitled to take part of the estate as one of the *"next of kin"* she did clearly allege that she was entitled to take part of the estate as an *heir at law,* i.e. as a former wife allegedly entitled to inherit under the community property law of California. This distinguishes the case of *Beckett v. Selover,* 7 Cal. 215 cited on page 13 of the petition filed herein.

Whether she asserted her claim in the right tribunal or not is immaterial. The fact conclusive on her is that she did ask a Court of *unlimited* jurisdiction to pass on her claim on the merits and that the Court did so, adversely to her. This action she cannot reopen, as the learned Court of Appeals below properly held. To do so would be to irreparably injure respondents.

CONCLUSION.

This Court in approving the application of the doctrine of res judicata in this case (by denying the writ) will be doing no injustice.

Petitioner stated in her complaint in the District Court of Nevada when she divorced the decedent on November 14, 1946 there was "*no* community property", (Defs.' Exhibit E), then he died in December 1951, and she filed her petition on December 4, 1952 (Record pages 61-64) for determination of heirship.

In 1955 the California legislature amended the Code of Civil Procedure to provide that where a surviving spouse outlives a deceased husband or wife by more than four years it is presumed that all the property of the decedent was his or her *separate* property (California Code of Civil Procedure, sec. 1963, sub. 40). This amendment became necessary to prevent long since forgotten wives and husbands who obtained divorces while both spouses were young and impecunious, from looting their ex-husband's or ex-wife's estates when they happened to die many years later with large assets.

The record in this case shows that the petitioner herein was far from being an altruist. The complaint in her separate maintenance suit, commenced in Los Angeles on March 31, 1933, and particularly the settlement agreement attached to it compounding a felony. (Defendants' Exhibit C at the trial transmitted to this Court with all the other original exhibits as well as the printed record), shows that her sordid marriage was completely at an end in 1933, if

not before. Any attempt, started six years after the Nevada divorce, obtained at petitioner's behest to get half of his estate at the expense of his children deserves no consideration whatsoever.

The petition for a writ of certiorari should be denied.

Dated, September 11, 1957.

Respectfully submitted,

DELGER TROWBRIDGE,
Attorney for Respondents.

DOUGLAS A. MOORE,
Attorney for Respondent W. A. Robison, Administrator of the Estate of Robert Sidebotham.

THEODORE M. MONELL,
Attorney for Respondents Robert Sidebotham and James Sidebotham.

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Respondents.

PETITIONER'S REPLY BRIEF.

MANUEL RUIZ, JR.,
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Attorney for Petitioner.

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Respondents.

PETITIONER'S REPLY BRIEF.

Respondents have filed a reply brief to petition for writ of certiorari by attributing to Petitioner an unaltruistic purpose which is not borne out by the record, but intended to prejudice the reader, who for purposes of these proceedings will not have an opportunity to examine the same. Nor would the unfounded aspersions cast against petitioner, in any event be material, to the granting of the Petition.

The substance of the Petition filed by the Petitioner is in no manner distinguished by the cases cited by Respondent, who has created a "false premises" and then proceeded to argue against the same. By this procedure

Respondent is "playing fast and loose" with the Supreme Court, as it is generally known before the bar, that Petitions for Certiorari must of necessity be summarily passed upon, because of the tremendous burden which confronts said court, to separate the chaff from the wheat.

Thus, Respondent has continued to remain silent concerning the fact that the Petitioner was not decedent's widow, at the time of his death, and was a stranger to the estate. Respondent does not challenge this concededly admitted "correct" premise. Petitioner does not contend that the State Probate Court has a separate official status as Respondent erroneously claims. In speaking of said court, the Supreme Court of the State of California in *Schylen v. Schylen*, 43 Cal. 2d 361, made it clear that claims of title between the estate and strangers cannot be tried in the Probate Court, since the Probate Court is without jurisdiction. (See App. "C," p. 20 of Opinion.) See also the California State Law as enunciated in its Probate Code in Appendix "A" wherein the Los Angeles Superior Court is limited in its jurisdiction while sitting in probate, even though the Los Angeles Superior Court be a Court of General Jurisdcition. For the Respondent to take up the time of the Supreme Court, in defining particular functions of the State Courts of General Jurisdiction, while ignoring the "jural relationships" which govern the subject matter indispensable to jurisdiction in particular cases, is tantamount to claiming that the estate of a "live person" may be probated. In the case at bar, the petitioner alleged affirmatively that the decedent had "died intestate during the month of December 1951," and further stated that Petitioner and the decedent were divorced on "November 14, 1946" which was five years before the decedent died. Any recital by her that she was an "heir" and any decision by the Probate Court that

she was not an "heir" has never precluded her from asserting her rights as a "stranger" in the case at bar, as she may have no rights as an "heir," but still have rights as a "stranger."

It is to be lamented that Respondents have succeeded thus far in interchanging and confusing two different and distinct jural relationships to the extent of having invited the grossest of interference whereby a Federal Court, contrary to the Federal Constitution, is clothing a State Court with jurisdiction and powers which it is prohibited to exercise by State law. If this procedure be taken one step further, a Federal Court by the same circumvention could create by this expediency State Courts, by attributing to them attributes of power which under State law they cannot exercise. If, for no other reason at all, the Supreme Court ought set at rest, this sensitive matter, at once, at a time that certain State Courts in the south are straining to read between the lines, concerning the powers of the Federal Judiciary.

Respectfully submitted,

MANUEL RUIZ, JR.,

Attorney for Petitioner.